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AUG 1 2001

GENERAL COUNCIL
OF COPYRIGHT

In the matter of:

Digital Performance Right in
Sound Recording and Ephemeral
RecordingDocket No.
2000-9CARP DTRA
1 & 2CARP Hearing Room
LM-414
Library of Congress
Madison Building
101 Independence Ave, SE
Washington, D.C.Tuesday
July 31, 2001

The above-entitled matter came on for hearing,
pursuant to notice, at 1:00 p.m.

BEFORE

THE HONORABLE ERIC E. VAN LOON	Chairman
THE HONORABLE JEFFREY S. GULIN	Arbitrator
THE HONORABLE CURTIS E. von KANN	Arbitrator

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P-R-O-C-E-E-D-I-N-G-S

(9:01 a.m.)

CHAIRMAN VAN LOON: Good morning, everyone. Welcome back to our collective home away from home for the duration.

First, let me ask if there are any administrative or procedural matters that we need to take up this morning before we deal with our witnesses. Excellent. Okay.

Then, both Judge Von Kann and I need to state just very briefly with regard to limited relationships with witnesses to say that the first witness this morning was a law school classmate of mine. And we have not met or talked for a number of years related to -- obviously, not at all in any way related to this matter.

Curt?

ARBITRATOR VON KANN: I noticed in reviewing the list of witnesses that one of the witnesses to testify, Robert Yerman, was a fellow member of the Lafayette PTA Association.

(Laughter.)

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1 And 15 years ago, when our daughters both
2 went there and were somewhat friendly -- and I think
3 I probably saw him at one or two functions. I've not
4 seen him in a number of years. We've never been in
5 one another's homes. I didn't even know what work he
6 did. But I do happen to know him very casually from
7 about a dozen years ago and thought I should tell you.

8 CHAIRMAN VAN LOON: Then, we turn things
9 over to you, Mr. Garrett, to call your first witness.

10 MR. GARRETT: Thank you, Mr. Chairman.
11 We'll call Mr. Cary Sherman, please.

12 WHEREUPON,

13 CARY H. SHERMAN
14 was called as a witness and, having been first duly
15 sworn, assumed the witness stand, was examined and
16 testified as follows:

17 MR. GARRETT: Mr. Chairman, I'd like to
18 first point out for the record that we have moved the
19 slide projector --

20 (Laughter.)

21 -- so that the hot air now blows out at
22 me.

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1 (Laughter.)

2 CHAIRMAN VAN LOON: And you have corrected
3 the tactical error from yesterday. This is greatly
4 appreciated.

5 MR. GARRETT: We learn from our mistakes.

6 CHAIRMAN VAN LOON: On behalf of the whole
7 panel, thank you.

8 (Laughter.)

9 DIRECT EXAMINATION

10 BY MR. GARRETT:

11 Q Mr. Sherman, would you state your name for
12 the record, please?

13 A Cary Sherman.

14 Q And what is your current position?

15 A I'm the Senior Executive Vice President
16 and General Counsel of the Recording Industry
17 Association of America.

18 Q Would you briefly describe your
19 responsibilities in that position?

20 A I'm responsible for the legal affairs of
21 the organization and for legal issues affecting the
22 recording industry. And I also coordinate the policy

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1 and business and technology and legal objectives of
2 the industry.

3 Q How long have you been employed by the
4 Recording Industry Association of America?

5 A Since May of 1997.

6 Q And prior to that, what did you do?

7 A Prior to that, I was a senior partner at
8 Arnold & Porter. I was the head of the Intellectual
9 Property and Technology Practice Group. One of my
10 major clients was RIAA. In fact, in my 26 years at
11 Arnold & Porter, I represented RIAA for 23 of them.

12 MR. GARRETT: Mr. Chairman, I'm not
13 certain what practice you would like to follow
14 throughout the proceedings. Being the first witness,
15 I'll just raise the question. I would normally turn
16 the witness over for voir dire. If that's the
17 practice you would like to follow, I'll do that at
18 this time.

19 ARBITRATOR VON KANN: Is he being offered
20 as an expert?

21 MR. GARRETT: In the area of music law,
22 yes.

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1 ARBITRATOR VON KANN: Probably should,
2 then.

3 MR. RICH: We have no voir dire of Mr.
4 Sherman.

5 CHAIRMAN VAN LOON: Excellent.

6 BY MR. GARRETT:

7 Q Mr. Sherman, I'll ask you, do you have a
8 copy of the testimony that you have submitted in this
9 proceeding here?

10 A Yes.

11 Q All right. Would you just briefly
12 describe for the Panel the purpose of your testimony?

13 A The purpose of the testimony is basically
14 to try to familiarize the Panel with the concepts and
15 terms that are going to occur repeatedly throughout
16 this case with respect to music copyright law. It's
17 a very complicated area of the law, and there will be
18 lots of acronym use, names of organizations, and legal
19 concepts that will come up, and I'm hoping to try and
20 lay the groundwork for that.

21 And I also want to try and explain the
22 distinctions as a matter of law in copyright between

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1 music works and sound recordings.

2 Q Could you just briefly walk us through
3 your testimony?

4 A My statement basically covers the items
5 listed on the screen. Basically, pages 3 to 4 go
6 through the various types of works that will be
7 covered in the proceeding. Pages 5 to 10 discuss the
8 various types of rights that are relevant to the
9 proceeding. Pages 11 through 13 review the various
10 owners of copyright. Pages --

11 CHAIRMAN VAN LOON: Excuse me. I'm sorry
12 to interrupt. Just a second, Mr. Sherman.

13 MR. RICH: I rise to offer a semi-
14 objection or at least an important clarification.
15 There's been a handout this morning, which I don't
16 believe reflects any either formal written direct
17 testimony or -- I don't believe this document, either
18 as a compilation or individually, itself is an
19 exhibit.

20 Am I correct, Mr. Garrett?

21 MR. GARRETT: That is correct.

22 MR. RICH: And there is some concern here,

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1 not so much whether this accurately or doesn't
2 accurately synopsise the testimony, but it is without
3 a doubt supplemental to what has been put in as direct
4 testimony. Just flipping through, there is a graphic,
5 for example, which we've not seen before.

6 And I don't think the issue is whether
7 it's innocuous or not, but, rather, because our
8 friends on the other side have taken an
9 extraordinarily stringent view of the degree to which
10 the formal direct testimony and exhibits can be
11 supplemented at this stage.

12 For example, through motion practice
13 successfully pressed before the Copyright Office the
14 proposition that a picture of a web page could not be
15 supplemented with a live demonstration of that web
16 page before the Panel. Am I correct about that?

17 MR. STEINTHAL: Yes, you are.

18 MR. RICH: That in the circumstances,
19 what's sauce for the goose would seem sauce for the
20 gander. And it seems to me we ought to have some clear
21 set of understandings that if we're going to
22 supplement within a modest range, that's fine.

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1 I would invite the RIAA to withdraw its
2 objection for live demonstrations, else I press the
3 formal position, which is Mr. Sherman should rely on
4 his direct testimony, not supplementary material we've
5 never seen before.

6 CHAIRMAN VAN LOON: I'm not certain
7 whether that makes you the goose or the gander, but --

8 (Laughter.)

9 MR. GARRETT: I think the rule in the
10 proceeding, Your Honors, is that the witness may not
11 materially supplement his written testimony. We are
12 not trying to materially supplement Mr. Sherman's
13 written testimony. What you see on those slides are
14 simply visual representations of things that are
15 already in his testimony. He makes no new points.
16 There's no new testimony. This is simply an aid to
17 understanding the testimony that he has already
18 submitted.

19 It's very different than the issue that
20 arose in connection with the live demonstrations. I
21 don't know if the Panel is familiar with what that
22 issue was. But basically our objection was not that

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1 they were trying to simply take a -- something that
2 had already been presented and supplement it with a
3 live demonstration.

4 Our objection there was is that there was
5 no notice given of exactly what points, what
6 information, what kind of material was going to be
7 presented during that live demonstration. And it was
8 on that basis that the Copyright Office sustained our
9 objection.

10 We obviously have no problem with giving
11 live demonstrations if they were confined to points
12 that were already made in the testimony, but they
13 didn't do that. What they did is they said, "We're
14 just going to have a live demonstration without any
15 fair notice of what exactly was going to be in the
16 demonstration."

17 Here I believe all of the points that you
18 see on the slides here, which, again, are just simply
19 visual aids -- and slides are not evidence -- are
20 intended to -- not to supplement his testimony, but
21 just to help you follow it and help explain it.

22 MR. STEINTHAL: If I may, since I was the

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1 one that was involved with the prior motion, if that's
2 the standard, then I can honestly say to you that all
3 we intended to do with the live demonstrations -- and
4 the notion that there was no notice is just wrong.

5 In February, when we were here before the
6 Copyright Office, we actually inquired about the
7 ability to access sites on the internet because it was
8 our intention to do so during the hearing. And it
9 wasn't until we actually indicated in our direct cases
10 that we intended to make reference to the actual sites
11 during the course of the hearings that the RIAA
12 objected, when they knew months in advance we intended
13 do it.

14 But if the standard is as Mr. Garrett
15 says, all we intend to do by accessing the website is
16 to bring to life that which is within the substance of
17 the witness' direct testimony. You saw screen shots
18 in Mr. Garrett's opening yesterday. We simply wanted
19 you to see, on an interactive basis, how one goes from
20 one part of a site to another, all within the very
21 scope of what is presented in the direct testimony.

22 And there seems to be no difference to me

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1 between having a slide show today which supplements
2 and brings to life in a different way that which Mr.
3 Sherman said in his direct testimony and what we
4 intend to do with the live website demonstrations
5 during our direct witnesses' testimony.

6 So, again, we would withdraw our objection
7 to the utilization of this sort of demonstration if we
8 can do the same thing, as long as we confine ourselves
9 in those live demonstrations to the subject matter of
10 what we've said in our direct testimony, so you can
11 see the way our website works. You can see the way
12 these webcasters do business, what is at stake.
13 Nothing outside the scope of our direct testimony.

14 Then, again, what's sauce for the goose is
15 sauce for the gander. We're happy to have him do the
16 same thing if we can do it.

17 CHAIRMAN VAN LOON: Is my memory correct
18 that this has been argued before the legal staff and
19 there was a ruling already excluding --

20 MR. STEINTHAL: There was a ruling that,
21 based on the motion made by --

22 MR. GARRETT: The answer is yes, Your

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1 Honor.

2 MR. STEINTHAL: Thank you. Yes, there was
3 a ruling made on --

4 ARBITRATOR GULIN: I'm familiar with the
5 ruling, and I guess Mr. Steintal took the words out
6 of my mouth, Mr. Garrett. If they're willing to run
7 -- if the question is notice, and they're willing to
8 run by you exactly the demonstration they intend to do
9 and they're not materially supplementing their
10 testimony, would you object to that?

11 MR. GARRETT: The problem, Your Honor, is
12 that they did not state in their written testimony
13 points that they were going to be making during the
14 live demonstration. That was the argument that we
15 made before the Copyright Office. And that's quite
16 different from here --

17 ARBITRATOR GULIN: And what is the point
18 you're making in these?

19 MR. GARRETT: I think you have to
20 distinguish between notice of the slides and notice of
21 what is contained on the slides. I believe everything
22 that is contained on the slides is contained in the

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1 written testimony of Mr. Sherman.

2 ARBITRATOR GULIN: And everything -- I
3 assume they're going to say that everything in the
4 live demonstration -- what it intends to demonstrate
5 has been discussed in their direct testimony.

6 MR. GARRETT: That was not the position
7 that they were taking before the Copyright Office.

8 ARBITRATOR VON KANN: In other words, if
9 in the testimony of one of their witnesses it says one
10 of the great advantages of this is you can go to a Buy
11 Now button, and they want to have somebody sit here
12 and say, "Hey, that's a Buy Now button. See how it
13 works?" That strikes me as within the confines of
14 what they've already submitted.

15 If someone here goes on for an hour and a
16 half about the beauties of this web connection in ways
17 that are not at all disclosed in the direct testimony,
18 that's another situation. But it does seem, if
19 they're simply illustrating or demonstrating a
20 capability or a facet or an operation that is
21 described in the written testimony, it doesn't really
22 go beyond it.

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1 MR. GARRETT: Your Honor, again, we tried
2 to deal with that issue in our own direct testimony.
3 We understood that the Panel would be interested in
4 seeing demonstrations of websites, and we had one of
5 our witnesses actually make recorded demonstrations.

6 We put in a videotape that contained
7 exactly what it is that he was referring to in his
8 testimony, and we believe that was the proper
9 procedure, that was the procedure that should have
10 been followed. And the Copyright Office agreed with
11 that finding.

12 That is one of the peculiarities of this
13 practice here, that one submits this written direct
14 testimony, it's supposed to contain all of the
15 information that is then going to be presented during
16 the oral testimony. And, you know, this is what -- we
17 don't have discovery, as Mr. Steinthal pointed out
18 yesterday. We don't really have discovery in this
19 proceeding that allows us to get information. What we
20 do have is the written testimony.

21 ARBITRATOR VON KANN: What happened to
22 your videotape?

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1 MR. GARRETT: It is in the record.

2 ARBITRATOR VON KANN: And it is being
3 offered as an evidentiary exhibit or a demonstrative
4 exhibit?

5 MR. GARRETT: No, it is -- I'm not sure
6 that we distinguished between the two, but it was
7 being offered as an exhibit to the testimony of Mr.
8 Griffin, who will appear next week.

9 ARBITRATOR VON KANN: And at that point,
10 you would envision playing that videotape?

11 MR. GARRETT: Definitely.

12 ARBITRATOR VON KANN: And it shows Mr.
13 Griffin sitting at a computer doing wonderful things
14 or something?

15 MR. GARRETT: Mr. Griffin spared filming
16 himself, but it does show --

17 (Laughter.)

18 -- what would happen if one goes to a
19 website and logs on to that website and goes through.
20 And it shows the buy buttons and other different
21 things.

22 ARBITRATOR VON KANN: How long is that,

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1 about? Is it five minutes or an hour and a half or --

2 MR. GARRETT: I think there are two tapes
3 and they total about 35 minutes.

4 MR. SIGALL: No, just one tape is 35
5 minutes. The other tape we do not plan to show. That
6 was provided for the Panel's reference.

7 MR. STEINTHAL: Can I add one thing?

8 ARBITRATOR GULIN: Before you do, let me
9 just say I don't have any problem with the videotape.
10 That's clearly in evidence. It hasn't been stricken
11 from the record. It can be played. There's no
12 question about that.

13 What we're talking about is this, and I
14 still do not understand the distinction between this
15 and what they were trying to do with a demonstration
16 of -- with respect to the internet. They never said
17 anything about the internet. They've never given you
18 any notice about it, just like you had never given
19 them any notice about this.

20 And they came in and started to do this
21 demonstration. How is that demonstration different
22 from this? As long as they stay within the scope and

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1 do not materially supplement their testimony?

2 MR. GARRETT: I think the issue, Your
3 Honor, is that we believe that what's in those slides
4 -- and Mr. Sherman wants to present here -- simply
5 contains points that are made in his written
6 testimony. With respect to live demonstrations, there
7 was never any representation, there was never any
8 indication in their testimony that these live
9 demonstrations were going to be confined to points
10 that were in his testimony.

11 Furthermore, the problem is is that
12 websites, as you may know, are not static. They're
13 constantly changing. And had they actually done a
14 videotape of a website back when these direct cases
15 were due, as we did, we would have all of the
16 information that was there. We'd be able to prepare
17 our cross examination on that basis.

18 That website, as it existed, in April may
19 be entirely different when it comes in to testify --

20 ARBITRATOR GULIN: Would you allow them to
21 do a videotape now of a demonstration of using the
22 internet and accessing these webcasts, and present

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1 that, as long as they give you notice of it first?
2 Or --

3 MR. GARRETT: I think they would certainly
4 have the ability to do that on rebuttal, Your Honor.
5 The problem is is that -- that that type of videotape
6 should have been exchanged back in April. So we would
7 have had an opportunity to present our cross
8 examination.

9 ARBITRATOR GULIN: Let me ask you this.
10 How would that type of videotape that they attempt to
11 play, and that they've already allowed you to see,
12 even though you've not allowed them to see this in
13 advance, how would that videotape be different from
14 this?

15 MR. GARRETT: Again, Your Honor, we
16 believe that what is in here is simply the points that
17 are already in Mr. Sherman's testimony and which they
18 have had notice of since last April.

19 ARBITRATOR GULIN: Okay.

20 CHAIRMAN VAN LOON: What I'm wondering, it
21 seems to me we're trying to balance a lot of different
22 things here. And one of which is getting through a

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1 lot of material in a short period of time. And
2 another aspect is familiarization with a new and
3 evolving technology where there's a lot of different
4 aspects.

5 I recall that in the written direct
6 testimony, the number of the witnesses -- they did
7 say, "I plan to make a demonstration during my
8 presentation," but without indicating what the content
9 of the demonstration would be.

10 Is it conceivable that counsel, on a sort
11 of a one-to-one basis, prior to the day, for example,
12 of the testimony -- I understand that I guess this
13 room can be set up to connect with the internet,
14 because you rightly make the point that sites change.

15 But if there could be a preview the day
16 before, or at a time that's convenient, with the
17 understanding that we're trying to keep this within a
18 reasonable balance with regard to time and all the
19 rest, is that something you'd be willing to consider?

20 MR. GARRETT: Your Honor, obviously, if
21 it's the Panel's sense that that should be done, we'd
22 be open to it. And my only concern here is is that,

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1 you know, this was an issue that we had litigated
2 before the Copyright Office. We thought we had a
3 final resolution to that issue.

4 I am still concerned about the fact that
5 we should have had that tape or we should have known
6 exactly what it was that they were going to put in
7 there. But if the Panel truly feels that these
8 slides, which simply recite, you know, key phrases
9 from the testimony, if you truly feel that that's the
10 same situation, then obviously we won't use the
11 slides.

12 But I really hate to start the precedent
13 here of going back and relitigating all of the things
14 that we spent the last several months litigating
15 before the Copyright Office.

16 MR. STEINTHAL: If I may, if Mr. Garrett
17 raised the motion to begin with because he thought
18 there was no limitation, his words today were,
19 "There's never any limitation in the direct
20 testimony," indicating that the live demonstration
21 would be limited to the subject matter of the direct,
22 then we're happy to make that representation that

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1 their live demonstration would only relate to the
2 subject matter of what's in the testimony and to give
3 them advance preview of it.

4 I must say that in open hearing in
5 February we inquired of the Copyright Office as to
6 whether or not there were internet hookup
7 capabilities. We precisely stated to the RIAA that we
8 intended to access the websites during the testimony
9 of our witnesses, and in part so you could see the way
10 this works.

11 It's not all, you know, that easy to look
12 at a piece of paper and see the way the websites work.
13 We don't want to go beyond the scope of our direct
14 testimony, and we thought that the easiest thing to do
15 is provide screen shots that were exemplary and then
16 have an opportunity for you to see the way it worked.

17 We're happy to do the previews. We were
18 shocked to see the motion in April when it was made.
19 And if the key thing was that they were concerned that
20 we'd go beyond the subject matter, we're happy to
21 accommodate them and make the commitment that we won't
22 go beyond the subject matter of our direct.

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1 MR. SCHECHTER: Your Honor, if I could
2 read what the Copyright Office said in response to the
3 argument.

4 CHAIRMAN VAN LOON: Would you state your
5 name for the record?

6 MR. SCHECHTER: I'm sorry. Sorry. Ronald
7 Schechter. "Webcasters' argument that the Copyright
8 Owners waived objection to live demonstrations at the
9 March 14th meeting is without merit. That meeting was
10 held prior to the submission of written direct cases
11 in this proceeding. As noted, there is no prohibition
12 in the CARP rules to presenting live demonstration of
13 testimony at the hearing, provided that the testimony
14 is included in the written direct case. Neither the
15 Copyright Owners nor the Library could have known on
16 March 14th that Webcasters would seek to present
17 testimony at the hearing that they did not include in
18 their written direct case."

19 The Copyright Office considered those
20 arguments and rejected them. I might note, I mean, we
21 are willing to cooperate as much as possible, but
22 there is a lot to do in this hearing to get ready for

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1 witnesses. And to start having live demonstrations --
2 you know, preview demonstrations the night before
3 witnesses are testifying would place an even greater
4 burden on counsel than already exists in an
5 abbreviated timeframe.

6 The Copyright Office stated that they
7 could present this testimony. "If Webcasters believe
8 there are important elements of these sites that
9 require explanation, it can seek to present such
10 testimony in the rebuttal phase of this proceeding
11 where the testimony can be properly vetted through
12 discovery and cross examination." We haven't had that
13 opportunity.

14 MR. RICH: Your Honor, the logic of that
15 ruling disagrees plainly with this document. This is
16 new testimony. This is, in the words of the Copyright
17 Act, a new copyrighted document. This has different
18 headings. Just take the broadcast example. Find
19 that, if you will, in the Table of Contents. It
20 doesn't exist. Who gets paid to webcast? It's a new
21 piece of testimony.

22 I'm probably delighted to have it here as

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1 an aid to the Panel if the ground rules are going to
2 be equivalent. If we're going to literally follow the
3 wording just cited by my colleague to the left, this
4 plainly needs to be excluded today.

5 I don't think that's the best result, but
6 it's the fair result if the live demonstrations are
7 being precluded.

8 MR. GARRETT: We'll withdraw the slides if
9 that is what will resolve this controversy here. I am
10 not going to relitigate something that was fought hard
11 over at the Copyright Office on this issue. I
12 honestly and truly believe that this situation is
13 different, but, you know, if the Panel feels that it's
14 not, then I would be happy to withdraw the slides.

15 CHAIRMAN VAN LOON: I think what the Panel
16 would like to do, with apologies to everybody, is
17 withdraw for a couple of minutes to discuss this. We
18 think it's an important matter, and the overall goal
19 is, of course, to get the most information in front of
20 us in the most efficient fashion. And these look like
21 they would be an aid to that.

22 So if you could please excuse us for a

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1 couple of minutes.

2 (Whereupon, the proceedings in the
3 foregoing matter went off the record at
4 9:25 a.m. and went back on the record at
5 9:43 a.m.)

6 CHAIRMAN VAN LOON: Thank you for your
7 patience and forbearance. We have decided that we do
8 not wish to begin the first morning of our first
9 witnesses by appearing to reverse a decision of the
10 counsel. So we have worked out the following
11 arrangement.

12 First, we believe we will be greatly aided
13 and welcome having this -- the use of this aid this
14 morning under a special exception for the first
15 morning, if you will.

16 Secondly, we wish to require that all
17 parties that would present any format points in
18 advance, points to supplement what -- and elaborate on
19 what a witness does, must present that to the other
20 side 24 hours in advance of presenting them and using
21 them in the hearing. So that we will welcome
22 additional visual aids of this type, but with 24

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1 hours' notice.

2 Third, we wish to have an opportunity, if
3 the parties so wish, to receive video demonstrations
4 of live materials. And so if a party wishes to do
5 that, other than the videos which we already have and
6 which are already received in evidence as part of the
7 written direct case, that may be done but needs to be
8 shared with opposing side a full week in advance of it
9 being used.

10 And, last, everyone is reminded that the
11 ruling of the Copyright Office addressed the
12 opportunity for demonstrations in rebuttal based on
13 things that had already been submitted in video format
14 and for the other side's preview.

15 Are there any points to supplement --

16 ARBITRATOR GULIN: The only thing I would
17 add is, of course, if you do wish to use these
18 demonstratives, of course, they still must not
19 materially supplement the direct cases.

20 ARBITRATOR VON KANN: I think one point,
21 just a possible clarification, what we are, in effect,
22 doing I think is adhering to the librarian's

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1 determination that at this point it is too late to add
2 live testimony to the direct cases.

3 But either side can present demonstrative
4 exhibits, be they the kind of visuals you used
5 yesterday, both sides used in opening statements, or
6 this kind of format, or even a videotape that
7 demonstrates a point in the direct. It doesn't become
8 testimony. It's too late to add testimony. But it
9 becomes a demonstration or illustration.

10 These we think you should see 24 hours in
11 advance to just make sure, and the videos a week in
12 advance because that's a little bit more complicated.
13 But we're not -- that does not expand -- that video
14 does not become testimony. It's too late to add
15 testimony. It is a demonstrative exhibit, if you
16 will.

17 What you do about the rebuttal cases in
18 conformity with the librarian's ruling is a different
19 issue.

20 MR. KIRBY: Just one point of -- just two
21 points of clarification. I'm Tom Kirby. First, the
22 24 hours I hope is 24 hours during the business week.

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1 I would hate to receive, at 10:00 on Sunday morning at
2 my office, an outline that would be used on Monday
3 morning.

4 CHAIRMAN VAN LOON: That's certainly the
5 intent of the Panel.

6 MR. KIRBY: All right. Secondly, just to
7 be clear, the ruling doesn't apply to graphics that
8 might be used in cross examining a witness, I would
9 hope. So that we don't have to give 24 hours' notice
10 of a slide like one of these that we'd want to put up,
11 and then walk the witness through it on cross
12 examination.

13 ARBITRATOR GULIN: I wouldn't think that
14 would apply to cross examination.

15 MR. GARRETT: I would agree with that.
16 Yes.

17 ARBITRATOR GULIN: And did you have an
18 additional thought?

19 MR. GARRETT: Yes. I don't want to
20 complicate this, but I --

21 ARBITRATOR VON KANN: Hold on, Mr.
22 Garrett. Just to capsulize Mr. Kirby's point, perhaps

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1 we should modify 24 hours to say one business day
2 prior to the testimony of that witness. Go ahead.

3 MR. GARRETT: In terms of drawing on the
4 board during direct examination, do I take it from
5 your ruling that that would not be favored?

6 CHAIRMAN VAN LOON: Drawing on the board
7 as in a -- do you mean illustration on a flip chart --

8 MR. GARRETT: Yes.

9 CHAIRMAN VAN LOON: -- during direct
10 examination?

11 ARBITRATOR VON KANN: I think within
12 reason some amount of that should be tolerated. If it
13 gets too extensive, we might have to clamp down on it.
14 But just because somebody says, "The only way I can
15 really explain it is to" -- I think we should be
16 careful that if we start getting the impression that
17 this is, in effect, circumventing the requirement to
18 exchange in advance, we'll stop it.

19 But in the course of somebody's testimony,
20 and it may be necessary to do that I would think
21 within very reasonable limits, which we'll have to
22 apply as we go along.

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1 MS. WOODS: Just a clarification of the
2 previous business day point. I'm Michele Woods. Just
3 we wanted to make sure that wouldn't be just close of
4 business with the document the next day. That would
5 be 24 hours.

6 ARBITRATOR VON KANN: Anybody you're going
7 to call at 9:00 on Wednesday, you've got to give it to
8 them by 9:00 on Tuesday.

9 MS. WOODS: And I guess we can work out
10 for these rare -- how that exchange will be made.

11 CHAIRMAN VAN LOON: Yes. Yes. We'd ask
12 that the two logistical captains of each team --

13 (Laughter.)

14 -- keep the information flowing.

15 MS. WOODS: Thank you.

16 CHAIRMAN VAN LOON: It is our intent and
17 desire that each of you will get your full 90 hours,
18 that we won't be in a situation that sometime in
19 September we have to cut back on your 90 hours because
20 we've spent so much time on procedural matters. So we
21 want to do everything that we can to smooth these
22 things along and to aid you in the fullest possible

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1 presentation of all you have to show us.

2 Mr. Sherman, thank you very much, again,
3 for your patience. We're delighted to have you here
4 and look forward to your resumption of your testimony.

5 THE WITNESS: Thank you.

6 MR. GARRETT: I've been told that we've
7 now used up three minutes of our 90 hours.

8 (Laughter.)

9 BY MR. GARRETT:

10 Q I believe the question that I had asked,
11 and I will ask it again, was could you please walk us
12 through your testimony, explaining the key points that
13 are made in your written statement.

14 A The overview of the written statement is
15 reflected in this slide covering the types of
16 copyrighted works at issue, the types of rights
17 involved, the types of owners, the licensing bodies
18 who administer these rights, and the various types of
19 limitations that are used.

20 And they are at various sections in the
21 written testimony, and it is designed to be able to
22 give the Panel a reference point as issues come up or

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1 terms come up for the statutory references for the
2 various rights and limitations.

3 ARBITRATOR VON KANN: We need one more
4 copy of this. Must have put it down somewhere. Thank
5 you. Since we just fought so hard over it, I think I
6 should look at it.

7 (Laughter.)

8 THE WITNESS: I will just try to provide
9 the highlights from the written statement of what I
10 think are the key points, and I will try to move
11 through this rather quickly. But to the extent that
12 the Panel has any questions, please do not hesitate to
13 interrupt, so I can clarify anything that may be
14 unclear.

15 There are two copyrights in every sound
16 recording. There is the musical work and then there's
17 the sound recording. The musical work is the words
18 and music itself, and in this case we're using as an
19 example I Will Always Love You by Dolly Parton. This
20 is actually the sheet music and it literally is the
21 words and the music.

22 The sound recording --

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1 MR. GARRETT: Excuse me. Just for the
2 record, the document you just held up has been marked
3 as --

4 THE WITNESS: RIAA Exhibit 109DP.

5 The sound recording is the recorded
6 performance of the musical work, and in that case we
7 have a Dolly Parton CD where she actually sings that
8 song, and we have a Whitney Houston CD in which she
9 also sings that song.

10 Those are Exhibits 205 and 204, and they
11 basically indicate that you can have more than one
12 copyrighted sound recording of the same musical work.

13 There is also an audio-visual work
14 category which would include motion pictures and in
15 our case music videos. And here we have a music video
16 of Whitney Houston performing I Will Always Love You.
17 That's Exhibit 206.

18 The illustration is simply intended to
19 reinforce the point that you can have multiple
20 recordings of the same musical work, each of them --
21 each of those sound recordings being a separate
22 copyrighted work because each is a different

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1 interpretative expression of the musical work.

2 The sound recording is building on the
3 musical work, just like a music video may build upon
4 a sound recording. It's a further interpretation.

5 Turning to the issues of copyright itself,
6 Section 106 of the copyright law lays out the bundle
7 of rights that come with ownership of a copyright. I
8 won't bother reading them there. But the ones that
9 are of particular interest to us here are the musical
10 work rights and the sound recording rights.

11 As you can see, the musical work rights
12 include all of the first five rights, and the rights
13 for sound recordings include the first three rights
14 and a new right -- the right to perform by means of
15 digital audio transmission. That was added to the
16 copyright law in 1995 under the Digital Performance
17 Right and Sound Recordings Act. And then it was
18 expanded and enlarged in 1998 in the Digital
19 Millennium and Copyright Act.

20 MR. RICH: May I inquire for the record,
21 in my version of these flip charts, going back one to
22 the musical works, rights granted -- yes, I have

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1 another line.

2 THE WITNESS: I think that what happens is
3 it's grayed out in the -- in this slide. But when
4 it's printed it doesn't necessarily lay out.

5 MR. RICH: My question is whether this is
6 an accurate depiction of your testimony or that is an
7 accurate depiction of your testimony.

8 THE WITNESS: That is the accurate
9 depiction, yes.

10 MR. RICH: By "this," my reference is to
11 a bullet which says "right to perform by means of
12 digital audio transmission." I take it that's not
13 accurate.

14 THE WITNESS: That's correct. Thank you
15 for correcting that. I don't think there's anything
16 else that grays out, so I don't think we'll have any
17 more of these issues.

18 Yes, the same situation with respect to
19 this chart on the printed page. The right to perform
20 publicly and the right to display publicly are not
21 rights granted to owners of sound recordings.

22 Turning to the performance right, as it

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1 applies to the musical work, it really encompasses a
2 broad right to perform publicly the musical work. It
3 includes broadcasts, concerts, cable systems,
4 jukeboxes, and virtually everything else, whether it's
5 a live performance or a recorded performance, such as
6 whether it's a live band performing in a nightclub or
7 recorded performances in a discotheque.

8 The bodies that you will keep hearing
9 reference to, who license the rights for this
10 performance right, are ASCAP, BMI, and SESAC --
11 organizations of songwriters and publishers that are
12 collectively engaged in licensing.

13 With respect to the sound recording
14 performance right, it is a narrow right that applies
15 to digital transmissions only, and it specifically
16 excludes broadcasts as well as face-to-face events
17 such as concerts or jukeboxes in a nightclub.
18 Obviously, it was much to our regret that the
19 broadcast category was excluded.

20 We had been searching for such a right for
21 many, many years, but at some point we bowed to the
22 political realities and narrowed the right to digital

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1 transmission only and grandfathered radio stations.

2 So what we now cover with that right, that
3 Section 106.6 right, is digital services that will
4 include things like the digital cable music services,
5 DMX, Music Choice; satellite radio services -- there
6 are two new ones coming on stream soon -- Sirius and
7 XM Radio; and, of course, the webcasters, which is the
8 subject of this proceeding.

9 And the licensing bodies that license the
10 sound recording performance right include Sound
11 Exchange, which is a new organization that was created
12 by RIAA for that purpose, for the purpose of
13 licensing, collection, and distribution of royalties,
14 as well as the individual record companies themselves.

15 Turning to the reproduction right, in the
16 case of the musical work, all types of reproductions
17 are covered. We already gave the example of print --
18 namely, the sheet music that I held up earlier. It
19 would also include things like the lyrics and liner
20 notes.

21 In fact, in the early --

22 ARBITRATOR VON KANN: Mr. Sherman?

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1 THE WITNESS: Yes, sir.

2 ARBITRATOR VON KANN: Can I ask you one
3 question about that prior slide? Could you put that
4 back up for one second?

5 With respect to Sound Exchange as a
6 licensing body, I have not been -- I knew that they
7 were the negotiating body, but have the individual
8 record companies that participate actually assigned to
9 Sound Exchange their right to enter legally binding
10 licensing agreements? Or does Sound Exchange simply
11 negotiate it and then forward it on to the respective
12 record companies to sign or sign -- do they actually
13 hold, at that point, the copyright which they then are
14 permitted to license?

15 THE WITNESS: Yes. A non-exclusive
16 license is granted to Sound Exchange for the purposes
17 of issuing licenses.

18 ARBITRATOR VON KANN: Okay.

19 THE WITNESS: Turning to --

20 MR. GARRETT: We should just clarify that
21 Sound Exchange does not actually own the copyright.
22 They simply have the non-exclusive license to -- for

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1 those copyrights.

2 MR. RICH: May I hear that clarification
3 again?

4 THE WITNESS: That they're not
5 copyrighted. Sound Exchange doesn't own the
6 copyright. They're simply an agent for the copyright
7 owner.

8 We talked about sheet music. Back in the
9 early 20th century, there arose the issue of whether
10 the copyright in the musical work covered mechanical
11 reproductions. The specific issue was piano rolls,
12 and ultimately Congress clarified the law to say that
13 mechanical reproductions are covered, which is why
14 it's referred to as a mechanical royalty.

15 It's a term of art that's used in the
16 music industry only, and it would apply to everything
17 from piano rolls to then wax cylinders, vinyl discs,
18 cassettes, CDs, and, most recently, computer files.

19 And, of course, another major reproduction
20 opportunity is synchronization such as with a movie
21 soundtrack where the musical work is synchronized with
22 visual images. That would be the case in, for

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1 example, The Bodyguard where I Will Always Love You is
2 part of that motion picture.

3 The bodies that license the reproduction
4 right in connection with the musical work are the
5 Harry Fox Agency and individual music publishers. The
6 Harry Fox Agency represents many but not all music
7 publishers as an agent for purposes of administering
8 the statutory license for the mechanical royalty,
9 which I will turn to in a moment.

10 And individual music publishers can also
11 do that on their own, and they will often negotiate
12 synchronization rights on their own, and so on.

13 ARBITRATOR VON KANN: Does the Harry Fox
14 Agency operate in a similar fashion to Sound Exchange?
15 And the negotiating committee, does it actually
16 negotiate the license agreements?

17 THE WITNESS: No. The Harry Fox -- well,
18 the Harry Fox Agency often performs a dual function.
19 To some extent, it is simply given instructions by the
20 individual publisher as to the terms on which it will
21 license a specific type of recording.

22 In other situations, it serves something

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1 of a clearinghouse function where there is -- there
2 are offers presented and the Harry Fox Agency might
3 take those offers to the music publishers for
4 consideration.

5 So it serves both as an agent with
6 instructions in advance and as a clearinghouse for
7 receiving offers and then getting approvals.

8 With respect to the reproduction right for
9 sound recordings, it would include just what you would
10 expect. It would include the same wax cylinders, I
11 suppose, as well as vinyl discs, cassettes, CDs, and,
12 again, computer files. Again, there are
13 synchronization of the sound recording. It is the
14 sound recording of Whitney Houston that is
15 synchronized with the motion picture The Bodyguard.

16 And there is a new category of
17 reproductions called digital phono record deliveries,
18 which refer to a computer file that is made as the
19 result of a digital transmission.

20 The bodies that license the sound
21 recording reproduction right mostly are the individual
22 record companies, because most reproductions are

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1 separately licensed by individual companies. But
2 Sound Exchange also has a role here with respect to
3 the limited category of ephemeral recordings, which we
4 will talk about under Section 112 of the copyright
5 law.

6 Just to summarize, for musical works, the
7 copyright owners are the songwriter and the publisher.
8 The songwriter writes the music, gets into a business
9 relationship with a music publisher who generally then
10 owns the copyright. The bodies that license those
11 works for performances are ASCAP, BMI, and SESAC, and
12 for the reproduction right are the Harry Fox Agency
13 and individual publishers.

14 For sound recordings, you have the artist,
15 the producer, and all of the other people who are
16 involved in the creation of the sound recording, and
17 that would include everybody from the featured artist
18 as well as the background musicians, the background
19 vocalists, the record producer, the recording
20 engineers, the people who mix the sounds -- a large
21 group of people responsible for the creation of the
22 recording itself, and then there's the record label,

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1 so that in this case, for example, you would have
2 Whitney Houston and all the other people involved in
3 making the recording, and then Arista Records, which
4 is the record label that would then own the copyright.

5 The licensing bodies for sound recordings
6 include --

7 ARBITRATOR VON KANN: Can I stop you a
8 minute?

9 THE WITNESS: I'm sorry. Sure.

10 ARBITRATOR VON KANN: With respect -- the
11 mixing guy at some record company is a copyright
12 owner?

13 THE WITNESS: Well, if you take a look
14 especially at the legislative history of the creation
15 of a copyright for sound recordings, you will see that
16 the way that the music is put together is considered
17 an important function in terms of the creative act
18 and --

19 ARBITRATOR VON KANN: In other words, the
20 word "mixer" isn't -- doesn't have a legal copyright
21 in that product, does he? The record company for whom
22 he works does.

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1 THE WITNESS: It depends on the
2 contractual relationship between Bill Smith and either
3 the record company or the record producer or whoever
4 Bill Smith is working for.

5 ARBITRATOR VON KANN: So he may.

6 THE WITNESS: He may, yes.

7 BY MR. GARRETT:

8 Q Mr. Sherman, you discuss on page 12 of
9 your testimony, do you not, the different
10 copyrightable contributions to a sound recording?

11 A Thank you for reminding me of that.

12 Q And is that the reference to the
13 legislative history that appears there on page 21?

14 A Yes, the --

15 Q Footnote 21.

16 A Footnote 21 refers to the legislative
17 history I was just describing.

18 And then, going back to the licensing
19 function, the performance right with respect to the
20 statutory component of the performance right, that
21 would be licensed by Sound Exchange. Individual
22 record companies would license the performance right

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1 where they own an exclusive right that is outside the
2 statutory license.

3 And reproduction rights, again, are
4 generally licensed by individual record companies, but
5 Sound Exchange would have this function with respect
6 to ephemeral recordings.

7 Again, just to put this into context, who
8 gets paid when a CD is played by a radio station? In
9 the case of the musical work, that money would be
10 collected for the songwriter and the music publisher
11 by ASCAP, BMI, or SESAC, the performing rights
12 organizations. But for the sound recording, for the
13 artist and the record label, nobody is paid because
14 the right does not extend to performances by radio
15 stations.

16 Who gets paid when a record store sells a
17 CD? In the case of the musical work, the money is
18 collected for the songwriter and the music publisher
19 from the record company, generally by the Harry Fox
20 Agency. The sound recording -- the record company
21 gets its money and those royalties are shared with the
22 recording artists.

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1 And then, a final example, in the case of
2 webcasts, when a CD is played by a webcaster, again,
3 ASCAP, BMI, or SESAC collect the payments for the
4 songwriter and the music publisher for the musical
5 work, and Sound Exchange collects the royalties for
6 the artists and record companies for the sound
7 recording.

8 Q Mr. Sherman, you had also referred earlier
9 to the Sound Exchange as having a non-exclusive
10 license. Could you just explain what you meant by a
11 non-exclusive license? Who else can license?

12 A Individual record companies have the right
13 at all times to license everything related to a
14 performance or related to any of their copyright
15 rights to any party. So that means that an individual
16 record company could do a deal with a webcaster that
17 would cover webcasting, that would be covered by this
18 statutory license, could cover webcasting that is not
19 covered by this statutory license, or both.

20 So there is an entire -- there is the
21 possibility of direct licensing at all times, where an
22 individual webcaster can go to an individual record

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1 company and seek the rights that otherwise might have
2 been negotiated by Sound Exchange.

3 ARBITRATOR VON KANN: Mr. Sherman, can you
4 flip back one slide, who gets paid, the broadcast
5 example? I have one question about that.

6 THE WITNESS: Yes.

7 ARBITRATOR VON KANN: We have been told in
8 various ways that the reason that it says "no one"
9 under Sound Recordings is that Congress apparently
10 concluded that playing records on the radio promoted
11 their sale, and that was, in effect, enough
12 compensation for you and you didn't need a royalty
13 payment on top of that.

14 Do you have -- can you help me understand
15 why that same rationale doesn't apply to the owners of
16 the musical work who also get additional compensation
17 if there are more sales? If playing the record on the
18 radio promotes more sales, then on your next flip
19 chart both sides -- the musical work owner and the
20 recorder -- get paid.

21 But with respect to this one, the
22 broadcast example, one side does and one side doesn't.

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1 And I'm trying to understand, to the extent you can,
2 why Congress saw that as a different situation,
3 because it would seem the rationale would be equally
4 applicable to the musical work copyright owners as
5 well.

6 THE WITNESS: I think actually your
7 question illustrates that it isn't true that it was
8 the promotional value that led Congress not to create
9 a right for sound recording owners. What we have here
10 is a historical anomaly.

11 Musical works had a copyright almost since
12 the beginning of copyright law, and the rights were
13 gradually extended with mechanical reproductions, and
14 so on, but sound recordings came much later after the
15 most important revision of the copyright law which was
16 in 1909.

17 As a result, you had radio stations begin
18 to use sound recordings as their primary programming
19 material before sound recordings had any copyright
20 protection. Once that happened, broadcasters did not
21 want to have to pay additional royalties to the
22 artists and record labels who produced the sound

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1 recordings. And, therefore, they vehemently blocked
2 any legislation that would extend the right to sound
3 recordings.

4 And the truth is they have the political
5 wherewithal to do that. If you think about it, every
6 Congressman has maybe five or more radio stations in
7 its district. How many Congressmen have record
8 companies in their districts? So try as we might, or
9 as the artist might, there was no way to overcome the
10 broadcaster's political opposition to the creation of
11 a sound recording.

12 We made the argument that you just alluded
13 to, that the same promotional benefit applies to the
14 musical works, and that's true of all copyright, in
15 fact. When you have a book that's made into a motion
16 picture, book sales skyrocket. But that doesn't mean
17 that you give away the book rights to the motion
18 picture studio. In fact, they negotiate and pay a
19 pretty sum for that opportunity.

20 So the promotional argument was basically
21 something that was used as a justification for
22 grandfathering radio stations when the Digital

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1 Performance Rights Act was created in 1995. We
2 understood politically the need to grandfather radio
3 stations, not just for their analog but for their
4 digital broadcasts as well.

5 It was a political compromise, and the
6 legislative history reflects the symbiotic
7 relationship as a means of justifying the distinction
8 between radio versus the new ground rules that were
9 now going to be created for new digital transmissions.

10 ARBITRATOR VON KANN: Thank you.

11 THE WITNESS: There are a number of
12 limitations on copyright, and I discuss those
13 beginning on page 14 of the written statement. And
14 they are detailed there, but it probably isn't
15 necessary to go through each of them. I think the
16 important point is that there are different exemptions
17 for musical works than for sound recordings because of
18 the different way these copyrights arose and were
19 treated under the copyright law.

20 One exemption that I want to mention in
21 particular is digital transmissions of sound
22 recordings to business establishments. This is the

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1 business establishment exemption, so that if a company
2 like Muzak or DMX transmits a musical sound recording
3 to a business establishment like The Gap or Banana
4 Republic, that would be exempt from the digital
5 transmission performance right.

6 But it is not exempt from the reproduction
7 right, and, therefore, a company in that business
8 would still need to get a license, and that's what the
9 Section 112 license is all about.

10 A second limitation --

11 BY MR. GARRETT:

12 Q Excuse me. When you say that's what
13 Section 112 is all about, are you suggesting that 112
14 covers all types of reproductions made by DMX?

15 A No. Section 112 only covers the specific
16 copies that are made in the servers on their premises
17 or in order to be transmitted by satellite or some
18 other transmission to a third party premises business
19 establishment. Another -- I'm sorry.

20 ARBITRATOR GULIN: Are you saying it does
21 not cover a situation where the product is physically
22 delivered and played on a proprietary device?

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1 THE WITNESS: That's correct. There have
2 been -- there's been a -- that business has been going
3 on for years where background and foreground music
4 services have created tapes which they would then
5 bicycle around to their retail customers for playback
6 in the store, and those reproductions are separately
7 licensed by record companies to those background music
8 services.

9 The ephemeral reporting exemption
10 certainly was never intended to apply to that. The
11 ephemeral reporting exemption or the statutory license
12 that we're referring to here was created in 1998 under
13 the Digital Millennium and Copyright Act.

14 ARBITRATOR VON KANN: I still haven't got
15 it perfectly. Can you crystalize for us a little --
16 if I'm DMX, what ephemeral recordings of mine are
17 covered by the statutory license and what aren't?

18 THE WITNESS: Okay. To the extent that
19 DMX creates a tape or a disk that is then physically
20 delivered to a retail location, that would not be
21 covered by the ephemeral recording right or exemption
22 or statutory license. That's covered -- that's an

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1 ordinary reproduction right.

2 To the extent that the same thing is
3 accomplished by providing a computer with the computer
4 files on it that is resident in the retail store,
5 again, that would not be covered by this ephemeral
6 recording exemption.

7 What the ephemeral recording exemption
8 would cover is where the server is maintained by the
9 business establishment service, such as DMX, and where
10 it is making transmissions from that server in real
11 time to the retail store -- in other words, where it's
12 a transmission such as via satellite into a store or
13 something of that nature.

14 ARBITRATOR GULIN: I'm sure this will be
15 a point of contention and legal argument, but just as
16 a heads up to us, can you give me some idea of what
17 you base that rationale on?

18 THE WITNESS: Basically, on the language
19 of the statute and the history of how this all came to
20 be. The ephemeral reporting exemption originally
21 started back with broadcasters when they made copies
22 of recordings on a tape in order to have preprogrammed

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1 material.

2 So instead of having to put an individual
3 disc on the turntable and sit there minute by minute,
4 they might create a temporary copy that would then be
5 simply played over the air, and there was an ephemeral
6 recording exemption created for that purpose. And,
7 basically, the ephemeral recording exemption,
8 therefore, has a history of basically being something
9 to facilitate a performance.

10 And in this case, of course, we're talking
11 about a digital transmission, and the transmission is
12 something that goes from one place to another rather
13 than in the same location. If you didn't look at it
14 that way, then playing a CD in the store to the
15 speakers would be a digital transmission, and that
16 would not make a lot of sense. Digital transmission
17 requires going from one place to another.

18 MR. GARRETT: Judge Gulin, just so the
19 record is clear on it, this is an issue that I had
20 referred to in my opening statement yesterday. We had
21 gone to the Copyright Office and asked them for a
22 ruling specifying precisely what is in and outside of

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1 the business ephemeral license. And in that filing,
2 we articulated our position as to what is in and what
3 is outside.

4 There was no response on the substance of
5 what is in and what is out from AEI or DMX, and the
6 Copyright Office also gave no response on what is in
7 and what is outside the Section 112 license.

8 There is an order that applies in this
9 proceeding that directs you to consider the different
10 types of services that they offer.

11 ARBITRATOR GULIN: We've seen the order.
12 We haven't seen any of the underlying pleadings with
13 respect to that order.

14 MR. GARRETT: I'd be happy to provide
15 those.

16 ARBITRATOR VON KANN: Perhaps Mr. Rich
17 would -- that statement, as just capsulized by Mr.
18 Sherman, about what is and isn't covered, is one that
19 you will dispute?

20 MR. RICH: In part. I don't know if this
21 is the moment you want to have a --

22 ARBITRATOR VON KANN: No.

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1 MR. RICH: -- a dialogue on --

2 ARBITRATOR VON KANN: No. I'll just flag
3 it as something we'll have to get to later. If you
4 told me we agree 100 percent, I'd mark it --

5 MR. RICH: Mr. Gulin's question, which is
6 often the case from my prior experience, is right on
7 the mark, because there really is no law on the topic,
8 and there is less than collusive guidance, with all
9 respect to the witness, from either the statute or the
10 legislation.

11 We'll look at interpretation and
12 interpolation which is going on to reach the
13 conclusions, however, sincerely believed by Mr.
14 Sherman. And what makes it even more complex is that
15 the technology, as you will hear from the witnesses
16 who will be put on DMX and AEI, is itself an evolving
17 technology, and there are many what we would argue
18 candidly gray areas as to what arguably is or isn't
19 within the ephemeral.

20 And so I think it's not a cut and dried --
21 not so cut and dried a proposition as with respect to
22 Mr. Sherman's suggestion.

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1 BY MR. GARRETT:

2 Q Mr. Sherman, let me just ask you to turn
3 to Exhibit 116DP, which contains Section 112.

4 A Yes.

5 Q And direct your attention to page 34 of
6 that exhibit.

7 A Yes.

8 Q Could you just describe what is included
9 there?

10 A Yes. This is Section E -- we're on
11 page 34 of Exhibit 116DP. And if you take a look at
12 the specific language of the statute, where it refers
13 to what the statutory license covers, it's referring
14 to a transmittal organization that's entitled to
15 transmit to the public performance of a sound
16 recording. So already you have the notion that there
17 has to be a transmission involved.

18 And then when you look at the following
19 conditions, it talks about the phono record being
20 retained and used solely by the transmitting
21 organization that made it, which would also be
22 inconsistent with the notion of it being given to

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1 somebody else. That it's used solely for the
2 transmitting organization's own transmissions rather
3 than somebody else's transmissions. And then, of
4 course, there are issues of archival preservation, and
5 so on and so forth.

6 Q You were discussing the general exemptions
7 when --

8 A Right. And I was about to turn to
9 statutory licenses, because statutory licenses are
10 another important and interesting limitation on the
11 owners of copyright rights. Statutory licenses
12 guarantee access to copyrighted works in exchange for
13 the payment of an established royalty fee as well as
14 compliance with certain other terms and conditions.
15 And here again, the statutory licenses under the
16 copyright law differ as between musical works and
17 sound recordings.

18 The statutory licenses applicable to
19 musical works include mechanical reproductions. That
20 was actually one of the very first compulsory
21 licenses.

22 The performing rights consent decrees are

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1 not technically statutory licenses under copyright
2 law, but they have a similar effect in terms of the
3 way that they operate and in terms of guaranteeing
4 access to all of the content to users on fair and
5 reasonable terms. And another example of a musical or
6 a statutory license is that for public radio.

7 With respect to sound recordings, there
8 are two statutory licenses, one in Section 114 for
9 performances, and another in Section 112. In
10 Section 114 --

11 Q I'm sorry. Before you go on to that, let
12 me just ask you to go back to the mechanical license.

13 A Yes.

14 Q And you refer on page 21 of your testimony
15 to a statutory mechanical rate.

16 A Yes.

17 Q Would you describe what you meant by that?

18 A Congress set a particular rate when it
19 first established this statutory license way back in
20 1909, and that rate has now been subject to
21 negotiation and arbitration along the same model as
22 the existing -- as this arbitration proceeding right

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1 here. If we can't reach an agreement voluntarily,
2 then it is subject to arbitration.

3 The rate that is set is basically the
4 ceiling that applies to what a record company pays to
5 a music publisher and songwriter. Record companies
6 very typically negotiate lower rates below that
7 statutory rate. It is almost unheard of for a rate
8 ever to be negotiated above the statutory rate.

9 So basically whatever rate is set, either
10 in negotiation or by the arbitration, becomes the
11 ceiling for the marketplace rate.

12 I'm going the wrong way. Sorry. I think
13 I was up to the statutory licenses that are covered by
14 Section 114. And the first of these was created under
15 the Digital Performance Rights Act in 1995. It
16 applied to subscription services like DMX that were
17 offering music by cable or by satellite to paid
18 subscribers, and there was a CARP proceeding that
19 began in 1996 that resulted in a rate of six and a
20 half percent.

21 The rate was clearly calculated to achieve
22 certain policy-based objectives. The standard in the

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1 statute identified certain objectives to be met by
2 that rate, and the result was the six and a half
3 percent rate. It was clear, especially from the Court
4 of Appeals opinion, that that was not intended to be
5 a marketplace rate or to reflect fair market value.

6 When this issue arose again in 1998, when
7 a new statutory license was created for webcasters
8 under the Digital Millennium Copyright Act, it was
9 very important to us to change the basis on which that
10 rate would be set, and we agreed to a willing
11 buyer/willing seller standard.

12 In this situation, back in 1998, we had a
13 question of whether webcasters were subject to the
14 exclusive rights of sound recording copyright owners.
15 There was a dispute on that issue. Congress clarified
16 the law in the DMCA, and the legislation provides that
17 the webcasters get the content, that they have an
18 automatic right to all of the music, and in exchange
19 they have to pay a fair market value for that music.

20 There was another question in -- that
21 arose in connection with the DMCA legislation in 1998,
22 and that is still a pending legal issue. And that is

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1 whether broadcasters are covered by this new right
2 when they simulcast their over-the-air radio signals
3 onto the internet.

4 And, basically, we have not been able to
5 reach an agreement on that legal issue with the
6 broadcasters. We did ask the Copyright Office for a
7 ruling on that issue. They ruled that broadcasters
8 were liable for their simulcasts. That issue has now
9 been appealed to the District Court in Philadelphia,
10 and we're expecting a ruling very soon.

11 ARBITRATOR GULIN: Mr. Sherman, what are
12 the policy reasons behind a different standard for
13 setting a rate for non-subscription versus
14 subscription services? Why a policy-based rate for
15 one and a free market rate for the other?

16 THE WITNESS: It really wasn't based on a
17 policy decision that subscription services should get
18 preferential treatment by being able to get below-
19 market rates.

20 It was rather a recognition that what
21 happened to us in 1997 with a CARP proceeding, and
22 then a court ruling that said that it did not have to

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1 be a marketplace rate, basically made us realize that
2 if we were going to agree to a compulsory license,
3 which after all takes away rights from the copyright
4 owner, we wanted to at least make sure that we were
5 going to get the fair market value of the music we
6 were providing.

7 Congress was not going to go back and
8 change the rules for people who have built their
9 businesses in reliance on those old factors and change
10 the rate-setting process that had just been gone
11 through. So those rules were kept for those
12 subscription services, but for new services that came
13 online a marketplace value was determined to be the
14 standard.

15 BY MR. GARRETT:

16 Q And would that be true for new
17 subscription services as well?

18 A It would apply to new subscription
19 services as well. There was another special rule
20 associated with XM Radio and Sirius, because they had
21 already begun building businesses, and so on, and they
22 made the argument that they should be based on the old

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1 standard as well, so that applies to them.

2 I don't remember whether there were some
3 minor tweaks in that standard, but basically any other
4 new services --

5 ARBITRATOR GULIN: XM and Sirius, they're,
6 what, satellite based?

7 THE WITNESS: They are satellite services
8 that have not yet begun operation.

9 ARBITRATOR GULIN: Okay.

10 THE WITNESS: But have been in the
11 planning stages for many years.

12 ARBITRATOR VON KANN: Who are the
13 services? I think it's five -- three or five -- I
14 think five -- preexisting services covered by the old
15 standard? Just so we have them clearly in mind, who
16 are they?

17 THE WITNESS: DMX, Music Choice, and
18 Muzak.

19 ARBITRATOR VON KANN: And the last is
20 Muzak?

21 THE WITNESS: Yes.

22 ARBITRATOR VON KANN: And, of course, we

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1 have DMX in this case, but it is -- it's DMX's
2 subscription service, if I get it, that would be
3 covered by the prior 6.5 percent ruling, I guess.

4 THE WITNESS: It's subscription services
5 to residential --

6 SPECIAL AGENT DAVIS: What?

7 THE WITNESS: It's subscription services
8 to residential users would be covered by the six and
9 a half percent -- here in this proceeding, with
10 respect to the ephemeral license statutory rate, not
11 the performance.

12 MR. RICH: To finish the thought, Judge
13 Von Kann, that's because with respect to delivery to
14 business establishments there is an exemption for
15 those same entities from the 114 obligation.

16 ARBITRATOR VON KANN: Thank you.

17 BY MR. GARRETT:

18 Q Mr. Sherman, you referred to the three
19 services -- subscription services that are covered by
20 the old standard. Are there any other services
21 covered by the old standard?

22 A As I say, I don't recall the specific

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1 tweaking with respect to the satellite radio services.
2 But other than that, there are no other services that
3 are covered by the old standard. All new services,
4 subscription or otherwise, would be covered by the
5 willing buyer/willing seller standard.

6 Q And the satellite radio services that you
7 described are XM and Sirius, correct?

8 A Yes.

9 Finally, turning to the Section 112
10 statutory license, as I mentioned earlier, that was
11 created by the DMCA in 1998 as well. It applies to
12 multiple copies made by webcasters and copies made by
13 business establishment services, and, there again,
14 Congress specifically provided that the rate was to be
15 set based on the willing buyer/willing seller
16 standard.

17 That is my brief summary of music
18 copyright law, and I'm happy to expand on anything
19 that has been confusing or you'd like me to expand on.

20 MR. GARRETT: Mr. Chairman, let me just
21 ask a technical matter here. We have identified --
22 there are several exhibits that Mr. Sherman is

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1 sponsoring. We've identified them in an attachment to
2 his testimony.

3 My understanding is that all of those
4 exhibits are formally in the record at this point, and
5 that there is no need to move for separate admission.
6 But I wanted to clarify that with the Panel.

7 CHAIRMAN VAN LOON: That is our
8 understanding as well.

9 MR. GARRETT: And there's no need for me,
10 at this point, to identify the specific exhibits?

11 MR. STEINTHAL: If I may address that,
12 there are -- there may not be exhibits to Mr.
13 Sherman's testimony that we object to, but certainly
14 the simple attachment of exhibits, or references in
15 the direct testimony to exhibits, we did not
16 understand to be the automatic inclusion of those
17 exhibits into evidence.

18 We may and do have objections to certain
19 documents, subject, of course, to foundations being
20 laid for certain of the documents. So on a witness-
21 by-witness basis, we certainly, in order to make it
22 efficient, would be happy to have a provision whereby

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1 there can be a wholesale offer of exhibits, indicate
2 whether we have any problems with those exhibits, so
3 that we don't have to take up a lot of time in
4 session.

5 But it's certainly not the case that we
6 have consented to every single exhibit that was
7 referenced to the RIAA's direct case.

8 MR. GARRETT: Well, my understanding,
9 then, is different than Mr. Steinthal's because I
10 thought that was really the purpose of the prehearing
11 controversy period. That if there were problems with
12 particular exhibits, that objections to those exhibits
13 should be raised at that time.

14 Now, I would agree that if there was an
15 objection that was not apparent from the face of the
16 record that was created then, that they would be free
17 to raise it. But otherwise, those exhibits are all
18 in.

19 ARBITRATOR GULIN: That's my
20 understanding, Mr. Steinthal, is that any objections
21 have to be raised during the prefiling period, during
22 the filing period of the proceeding, unless there is

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1 an objection that was not apparent on the face.

2 I believe -- I don't have it at my
3 fingertips, but I believe there is a rule that
4 addresses that --

5 MR. GARRETT: Section 251.45(c)(2).

6 ARBITRATOR GULIN: 251?

7 MR. GARRETT: .45(c)(2).

8 ARBITRATOR GULIN: It reads, "After the
9 filing of written cases with the CARP, any party may
10 file with the CARP objections to any portion of any
11 other parties' written case on any proper ground,
12 including, without limitation, relevance, competency,
13 and failure to provide underlying documents.

14 "If an objection is apparent from the face
15 of a written case, that objection must be raised or
16 the party may thereafter be precluded from raising
17 such an objection."

18 MR. KIRBY: Judge Gulin, that indicates
19 it's discretionary with the Panel whether to invoke
20 that law. It say may be, not shall be.

21 MR. JACOBY: Mark Jacoby, Weil Gotshal.
22 Let me also refer you to 251.47, subparagraph F, which

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1 states, "The parties are entitled to raise objections
2 to evidence on an improper ground during the course of
3 the hearing, including an objection that opposing
4 parties -- however, they may not raise objections that
5 were apparent from the face of the written case and
6 could have been raised" -- so there may be issues that
7 arise by reason of the underlying documents that were
8 furnished during discovery that are not apparent from
9 the face of the case that we would be raising to the
10 Panel for an evidentiary ruling.

11 ARBITRATOR GULIN: No question. I think
12 the question that was raised by Mr. Garrett is really
13 a mechanical one. Are the documents in evidence? And
14 I think the answer to that is yes, they're in
15 evidence.

16 I don't think we go -- this is a procedure
17 where we go through every exhibit and they each have
18 to be offered into evidence one at a time. They're
19 all in evidence. They are subject to -- I guess we'll
20 need a motion to strike them from evidence if the
21 basis for that was not apparent from the document on
22 its face.

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1 MR. JACOBY: Yes. And, quite obviously,
2 there are situations in which if underlying documents
3 are produced, we don't have an opportunity to take a
4 deposition and cross examine the witness to understand
5 the relationship of the underlying documents to the
6 documents.

7 We'd have to -- after we've had an
8 opportunity for voir dire of the witness, then an
9 objection could be raised. And that's precisely what
10 I think we want to ensure we're preserving here.

11 MR. GARRETT: I think what we are all
12 saying is is that this particular issue is covered by
13 those two sections, and when an objection comes up to
14 a particular exhibit we'll be guided by those
15 provisions.

16 But at this point, as I understand it,
17 there are no objections to any of the exhibits that
18 Mr. Sherman has sponsored.

19 MR. RICH: That's correct.

20 CHAIRMAN VAN LOON: All right. So those
21 are in the record.

22 So am I understanding the presentation of

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1 the direct case is concluded, and you're ready for
2 cross?

3 MR. GARRETT: Well, the presentation of
4 Mr. Sherman's testimony.

5 (Laughter.)

6 CHAIRMAN VAN LOON: Correct. Of this
7 witness. Thank you.

8 MR. GARRETT: If you'd like us to go --

9 (Laughter.)

10 Yes, Your Honor. Mr. Sherman's direct
11 testimony is now complete, and he's available for
12 cross examination.

13 CHAIRMAN VAN LOON: Excellent. What we
14 would like to do is take the morning break at this
15 time, and then we'll be back at five 'til ready to
16 begin the cross.

17 (Whereupon, the proceedings in the
18 foregoing matter went off the record at
19 10:39 a.m. and went back on the record at
20 10:55 a.m.)

21 CHAIRMAN VAN LOON: The Panel has
22 discovered during the break that there is good news

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1 and there's bad news. The good news is you recall
2 that our lunch schedule in our tentative schedule
3 starts at 12:15. The bad news is that the cafeteria
4 here in this building is not open until 12:30.

5 (Laughter.)

6 MR. GARRETT: That's not bad news.

7 CHAIRMAN VAN LOON: That's for outsiders.
8 And the further good news is that it is open to the
9 Panel at 12:15. So we are, however, going to go till
10 our normal time, then we'll target 12:30 rather than
11 12:15 so that everybody can eat. Mr. Rich?

12 MR. RICH: Thank you.

13 CROSS EXAMINATION

14 BY MR. RICH:

15 Q Good morning, Mr. Sherman.

16 A Good morning.

17 Q You are employed by the RIAA; is that
18 correct?

19 A Yes.

20 Q I take it from your qualifications on the
21 heading of your direct testimony, your title is Senior
22 Executive Vice President and General Counsel; is that

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1 correct?

2 A Yes.

3 Q And I take it that your responsibilities
4 include that which the General Counsel of a trade
5 association would do, as well as public policy
6 involvement, correct?

7 A Yes.

8 Q And I take it you've been active, indeed,
9 very active on legislative policy issues; is that
10 correct?

11 A Yes.

12 Q Including copyright law issues, correct?

13 A Yes.

14 Q Including issues relating to the very
15 provisions of law which are an issue in this
16 proceeding, is that correct?

17 A Yes.

18 Q And is it accurate that the RIAA devotes
19 annually very significant resources to legislative
20 policy initiatives?

21 A I don't know what very significant is.
22 It's clearly part of our mission.

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1 Q A significant part of your mission, yes?

2 A Certainly.

3 Q I take it it's important to your members
4 that the RIAA represent those members vigorously
5 before the Congress on matters of concern to them; is
6 the correct?

7 A Sure.

8 Q And your personal mission and
9 responsibilities have included attempting to implement
10 that role; is that right?

11 A Sure.

12 Q And I take it before you came over to the
13 RIAA that you, for a number of years, were employed by
14 and a Partner at Arnold & Porter; is that correct?

15 A Yes.

16 Q And the RIAA was a client of yours; is
17 that correct?

18 A Right.

19 Q And during that period, I take it you
20 served as their outside counsel on copyright on
21 legislative policy issues; is that correct?

22 A Yes.

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1 Q And so I take it, in that capacity, you,
2 likewise, were or attempted to be a vigorous advocate
3 for the RIAA with respect to these issues; is that
4 right?

5 A Yes.

6 Q And I take it today in your testimony that
7 when you discussed your understanding as to the basis
8 for legislation or changes in particular provisions of
9 legislation and rationales for same, clearly, you were
10 testifying from your perspective, yes, as one who has
11 been an advocate of the RIAA for these many years as
12 to these issues; is that correct?

13 A Well, it's not just as an advocate; it's
14 as a participant.

15 Q And as an advocate; is that correct?

16 A Yes.

17 Q And as an advocate. And I take it that in
18 your tenure in dealing with legislative policy issues,
19 you, from time to time, have come across opposing
20 points of view on particular legislative matters,
21 correct?

22 A Certainly.

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1 Q And no exception with respect to sound
2 recording performing rights; is that correct?

3 A Certainly.

4 Q Indeed, in your testimony, you indicate,
5 in a passive voice, that efforts have been made, or
6 words to that effect -- on page 2 of your testimony,
7 "Efforts were made," you write, "to provide copyright
8 protection for sound recordings." You don't put a
9 time frame on that -- this is page 2 of your testimony
10 -- but whose efforts are you referring to?

11 A Well, it started in the 1940s with Paul
12 Whitehead who sought to get recognition of a
13 performance right, because at that time radio stations
14 were beginning to fire their live orchestras. You may
15 remember the NBC Orchestra led by Arturo Toscanini.
16 Those people were being let go. And as a result,
17 people like Paul Whitehead, who was a famous orchestra
18 conductor at the time, attempted to establish a
19 performance right for these recordings, and there were
20 all sorts of legal efforts that were made in that
21 direction. The unions became participants in this
22 effort. The musician union attempted to bring this to

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1 the attention of Congress in the 1960s. And I
2 personally became involved in this effort in 1974 and
3 was deeply involved in that issue from 1974 forward.

4 Q I take it there was opposition to the
5 effort to graft into U.S. copyright law a new sound
6 recording performing right; is that correct?

7 A That is correct.

8 Q And among the opponents were the broadcast
9 industry; is that correct?

10 A Absolutely.

11 Q And what is your understanding and
12 knowledge as to the basis for the position they
13 espoused in opposing the inclusion or expansion of
14 U.S. copyright law to include a new performing right?

15 A They said that they were already doing us
16 a favor by broadcasting our works, and therefore they
17 should not have to pay us for that privilege, and that
18 they already paid enough, saying that they were paying
19 these enormous fees to ASCAP and BMI, and they didn't
20 want to pay any more.

21 Q And I take it that RIAA and probably
22 individual RIAA members expressed their opposition to

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1 that perspective; is that correct?

2 A Yes.

3 Q And I take it that at least until 1995, at
4 a minimum, 1998 possibly, and depending on what the
5 federal district court in Philadelphia ultimately
6 rules, perhaps momentarily, subject to that, that all
7 the way up until that point in time, there was in fact
8 not enacted by Congress, not enacted by Congress, any
9 such performing right, correct?

10 A That is correct.

11 Q Notwithstanding the vigorous lobbying
12 efforts of the RIAA; is that correct?

13 A Yes. I think I made clear that our
14 vigorous efforts were going to be no match for the
15 broadcasters.

16 Q I take it the result was not accidental
17 that there was no such performing right. That was a
18 deliberate outcome of whatever inputs went into the
19 legislative process -- your inputs, the broadcaster
20 inputs, public policy inputs. Whatever that
21 mysterious mix turns out, the fact of the matter is
22 until very recently there was no performing right; is

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1 that correct?

2 A Yes.

3 Q And that was in opposition to the position
4 espoused by the RIAA; is that correct?

5 A Yes.

6 Q Okay. Now, notwithstanding your views as
7 to the relative political clout of the players, I take
8 it there is no dispute that the record labels spend
9 millions upon millions of dollars annually to promote
10 radio air play of their sound recordings; is that
11 correct?

12 A I don't know the number, but I certainly
13 assume that they do spend substantial sums promoting
14 it, yes.

15 Q Substantial millions of dollars, wouldn't
16 you agree?

17 A I assume.

18 Q Yes. Now, you indicated, by the way, in
19 your response to one of the Panel's questions that the
20 broadcasters, in your words, vehemently blocked the
21 legislation, which the RIAA sought. Do they have
22 special blocking rights legislatively that the RIAA

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1 does not?

2 A No. They're an interest group like any
3 other who petition their members of Congress. When I
4 say they vehemently blocked, I mean that they arranged
5 for broadcasters in all the various districts to go
6 visit their congressmen and make clear their
7 opposition to this legislation. They allied with
8 other groups to oppose the legislation and did the
9 usual kinds of things that one does in a lobbying
10 context.

11 Q And if I were to substitute the words
12 "RIAA" for "the broadcasters" in that last statement,
13 namely, is it not the case that the RIAA visited their
14 congresspeople, marshalled their resources, had people
15 visit, would that also be an accurate as to this
16 legislation?

17 A Certainly.

18 Q I take it the RIAA was not above bringing
19 in certain, shall we say, celebrities into the process
20 from time to time?

21 A Some artists came and made the case that
22 they were being disadvantaged because they couldn't

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1 collect royalties from the performance of their works
2 overseas. Almost every Western nation has a
3 performance right for sound recordings. And they
4 could not get access to those monies, and so, yes,
5 artists came in and testified to that effect.

6 Q Can you identify a couple of the artists
7 who have come in on the cause?

8 A The truth is I don't honestly remember.

9 Q Turn to page 3 of your written direct
10 testimony, please. And if you could put in front of
11 you, and if the Panel could put in front of it,
12 please, an exhibit, which is RIAA Exhibit 109 DP,
13 which I believe you identified as some sheet music
14 written by -- music written by Dolly Parton.

15 A Yes.

16 Q Okay.

17 ARBITRATOR GULIN: We don't have that.

18 MR. RICH: Oh, I'm sorry. We have it in
19 the next room.

20 CHAIRMAN VAN LOON: I think it not
21 necessary, because it's a very limited line of
22 questioning.

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1 MR. RICH: Would you like another copy?

2 MR. GARRETT: If you have extra copies,
3 that would be wonderful.

4 MR. RICH: I will give you my personal
5 copy. Now that this machine has been turned off --

6 CHAIRMAN VAN LOON: It would be dangerous
7 to give it to me.

8 BY MR. RICH:

9 Q Now, I believe both in your written direct
10 testimony and in your oral summary of that testimony,
11 you, in part, used the example of "I Will Always Love
12 You" as an example of a work as to which numerous
13 sounds recordings have been made over time; is that
14 correct?

15 A Yes.

16 Q Now, if you look at the bottom of the
17 first page of this sheet music, you see that this
18 arrangement copyright 1982 by Velvet Apple Music?

19 A Yes.

20 Q And what is your understanding of what an
21 arrangement is?

22 A An arrangement is a particular rendition

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1 of a copyrighted work. Arrangements can vary so that
2 it could be something like this or it could be
3 something far more complicated. And I gather that
4 this is referring to the arrangement that is captured
5 in this particular sheet music.

6 Q To your knowledge, does an arrangement
7 itself acquire copyright protection?

8 A Yes.

9 Q And who typically does the arranging? Of
10 the universe of owners and copyright owners and
11 players, who are these arrangers, for the Panel's
12 benefit?

13 A That can vary. I mean sometimes there are
14 specialist arrangers who actually handle those sorts
15 of things. In other situations, it could be the
16 songwriter him or herself.

17 Q But for each arrangement there is, as I
18 believe you just testified, just so the record is
19 clear, a separate copyright in that arrangement; is
20 that correct?

21 A Yes.

22 Q And it's an arrangement not of the sound

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1 recording but of the copyright musical work; is that
2 correct?

3 A Yes.

4 Q And is it also your knowledge and
5 experience that notable copyrighted musical works not
6 only spawn numerous sound recordings but also spawn
7 numerous arrangements?

8 A That may be true. In each case, the
9 arrangement is a derivative work. That isn't true of
10 different sound recordings. In other words, you start
11 off with the copyright, "I Will Always Love You."
12 Different arrangements of it will always be a
13 derivative work, one of those exclusive rights that I
14 mentioned in Section 106.6. So they'll all be
15 derivative of the original copyright in "I Will Always
16 Love You." Whereas each sound recording would be a
17 separate copyrighted work which are not derivative of
18 each other.

19 Q Nevertheless, you testified on direct that
20 each sound recording was itself a separate
21 copyrightable work; is that correct?

22 A Yes.

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1 Q It is equally the fact, is it not, that
2 each copyrighted arrangement of a musical work is also
3 its own copyrightable work, whether or not it is a
4 derivative work; is that correct?

5 A Yes.

6 Q Okay. And I take it that both the fact
7 that a given musical work spawns numerous sound
8 recordings and the fact that it might spawn numerous
9 arrangements is, among other things, testimony to the
10 popularity of that musical work; is that correct?

11 A Sure. I assume --

12 Q Goes without saying, yes? If it was an
13 obscure piece of music, it would appear, anyway, that
14 fewer rather than more sound recordings would be
15 created from it; is that correct?

16 A Yes.

17 Q Okay. Now --

18 ARBITRATOR VON KANN: Can I interrupt you
19 with a question? And I've got to warn all of you in
20 advance, when jargon goes by I'm probably going to
21 stop --

22 MR. RICH: I apologize.

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1 ARBITRATOR VON KANN: -- and get it
2 cleared up. Derivative work, what is the legal
3 significance of these arrangements being, quote,
4 "derivative?"

5 THE WITNESS: They need the permission of
6 the original copyright owner to create them so that
7 Dolly Parton or her music publisher would have to
8 authorize a new arrangement to be made, and therefore
9 they will earn royalties from each of the different
10 arrangements, even though they may not have created
11 them themselves.

12 Or the same copyright owner could hire
13 somebody to create different arrangements, one for a
14 beginner piano book, one for a guitar book, one for a
15 complex book of famous hits. So the publisher may
16 hire different arrangers to do it, but the publisher
17 would retain the copyright in all the different
18 arrangements, and all the revenue streams would flow
19 back to the original publisher.

20 ARBITRATOR VON KANN: So if someone
21 contacted Dolly Parton and said, "I'd like to write an
22 arrangement of this for an 84-piece orchestra," and

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1 she says, "Fine, you can do that, provided I get a
2 piece of the action, in essence." And that arranger
3 goes out and produces sheet music that would let 84
4 musicians play this, that's a derivative work of an
5 arrangement in which that arranger has a copyright
6 interest, but Dolly Parton, as the original copyright
7 holder, also gets some royalty compensation. Is that
8 it?

9 THE WITNESS: And that's totally a
10 contractual matter. The arranger might agree to
11 assign the copyright to Dolly Parton in the
12 arrangement in exchange for a fixed fee or in exchange
13 for a royalty share, or the arranger could keep the
14 copyright and pay royalties to Dolly Parton and her
15 publisher. It's purely a matter of contract.

16 In the case of sound recordings, because
17 there's a compulsory license, Whitney Houston could
18 come along and record "I Will Always Love You" without
19 asking for permission, because the compulsory license
20 gives her the right to use the underlying musical work
21 in this new recording once Dolly Parton first released
22 "I Will Always Love You" on a recording. That's the

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1 trigger. Once that happens, others can make what are
2 called cover recordings of that same musical work.
3 And in that case, you see, the royalties -- the same
4 music publisher and songwriter will get royalties from
5 the sale each of those sound recordings, but there
6 will be a separate copyright owner of each of those
7 sound recordings.

8 ARBITRATOR VON KANN: Okay. That
9 satisfies it.

10 BY MR. RICH:

11 Q Now, at page 4 of your written direct
12 testimony, you indicate that there are in fact some
13 150 different recorded versions of "I Will Always Love
14 You." Do you see that?

15 A Yes.

16 Q I take it that each performance of each
17 version of each of those sound recordings also entails
18 a performance of the underlying musical work; is that
19 correct?

20 A Yes.

21 Q Would you turn to page 13 of your written
22 direct testimony, please? Discussing the world of

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1 ASCAP, BMI, and SESAC, you indicate that the prevalent
2 practice is the grant of what you refer to as non-
3 exclusive blanket licenses. And you indicate toward
4 the bottom of the page that there also exists more
5 limited licenses for specific purposes. Do you see
6 that?

7 A Yes.

8 Q I'd like to explore that just a bit with
9 you. What is your understanding of other licenses
10 which, for example, ASCAP and BMI offer to radio
11 broadcasters on request?

12 A I don't purport to be an expert on the
13 intricacies of ASCAP licenses, especially when
14 compared with you. However, I believe that source and
15 programming licensing is the kind of thing -- a per
16 program license is something that broadcasters have
17 often sought as a way of reducing their performance
18 royalty obligations to ASCAP.

19 Q And do you have any understanding, whether
20 from the Buffalo Broadcasting case, which you cite, or
21 otherwise, as to what the essential function of what
22 you've termed correctly the per program license

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1 alternative to the blanket license is?

2 A I believe the purpose is to allow a
3 program producer to pick the particular pieces of
4 music that it wants to use and pay just for those
5 without having to pay for the rest of repertoire
6 that's included in the ASCAP catalog.

7 Q You said program producer. If I were to
8 substitute radio broadcaster, would you accept that
9 amendment of your answer; namely allow the broadcaster
10 to pick and choose, if you will, music or to license
11 music through other techniques than obtaining it from
12 the performing rights societies?

13 A Yes, although that's obviously a more
14 difficult and challenging thing to do.

15 Q Yes. And you correctly indicate that
16 those license arrangements are non-exclusive; is that
17 correct?

18 A That's my understanding, yes.

19 Q And do you understand it to be an
20 important aspect of the anti-trust consent decrees to
21 which you would also refer governing ASCAP and BMI,
22 that they are designed to encourage licensing

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1 techniques beyond simply the all or nothing blanket
2 license technique?

3 A Yes.

4 Q And that one such technique is the per
5 program license, yes?

6 A Yes.

7 Q And that per program license, as we've
8 just established, is designed to facilitate reaching
9 out for other marketplace transactions to secure the
10 musical or performing right if the licensees so
11 desire; is that correct?

12 A Yes.

13 Q Now, in your summary of testimony, if you
14 have that handy that Mr. Garrett took you through, you
15 --

16 A I didn't list the individual publishers
17 under that.

18 Q Yes, that's what I wanted to establish.

19 A Certainly --

20 Q There's a summary paragraph, and I was
21 going to ask you if it was inadvertent or --

22 A It --

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1 Q Let me get the question in for the record.

2 A Yes, sure. Please, go ahead.

3 Q You're ahead of me, but when you indicated
4 licensing body under summary musical works, you
5 indicated the three performing rights organizations
6 but did not put down or individual composers or music
7 publishers.

8 A Right.

9 MR. GARRETT: I'm sorry, which chart are
10 you referring to?

11 THE WITNESS: This would be where it says
12 "Summary Musical Works."

13 MR. RICH: Yes.

14 CHAIRMAN VAN LOON: Your question, by the
15 way, raises something that's as a housekeeping matter.
16 If it is possible in these kind of summaries that
17 we'll get in the future to number those pages, it will
18 just save us a lot of flipping back and forth in
19 future days. Thank you.

20 BY MR. RICH:

21 Q I'm sorry, you were going to answer,
22 respond.

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1 A Yes. It is clearly correct that
2 individual publishers would also be able to license
3 the performance right. That is still not very common
4 is my understanding, but they certainly have that
5 right.

6 Q And similarly, just so we have a clean
7 record, if you flip two pages back, farther down in
8 this summary, who gets paid, the broadcast example?

9 A Yes.

10 Q I take it, similarly, you left out, but to
11 be technically precise might have added, the
12 possibility that individual composers or music
13 publishers might receive direct payments, whether from
14 the producer of programming or from the broadcaster
15 directly; is that correct?

16 A That is certainly possible.

17 Q That that is in fact contemplated by the
18 ASCAP license framework.

19 A Yes.

20 Q Thank you. Excuse me one moment. And,
21 again, staying with ASCAP, BMI for just a couple of
22 more moments, you testified, both in your written

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1 direct testimony and you testified orally, that there
2 are similarities, I take it, as you see it, between
3 the functioning of the ASCAP and BMI consent decree
4 and the compulsory license process that were involved
5 in here, correct?

6 A Yes.

7 Q And among those similarities is the fact
8 that on a failure to reach agreement between the
9 parties there is a body, whether in the case of ASCAP
10 and BMI or federal district court or here, this
11 Arbitration Panel, to establish reasonable rates and
12 terms; is that correct?

13 A Yes.

14 Q Now, on page 14 of your written direct
15 testimony, under Section B, you make reference to
16 Sound Exchange, which you have identified, and you
17 indicate that it acts on behalf of record companies
18 that account for approximately 90 percent of all
19 legitimate sound recordings sold in the United States.
20 Do you see that?

21 A Yes.

22 Q Now, is that a group of companies that is

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1 co-extensive with the membership of the RIAA or is it
2 beyond -- is it supplemental to?

3 A Supplemental to the membership of RIAA.

4 Q Okay. Because I've seen various
5 testimonies of smallish, but maybe we could establish
6 it for the record, suggesting that RIAA itself
7 represents perhaps 85 percent or 90 percent of the, in
8 essence, recordings sold in the United States. What
9 is your best understanding of what is accurate as to
10 RIAA's -- what is encompassed by RIAA's membership
11 itself?

12 A Well, as you say, it varies depending on
13 sales in a particular year. Sound Exchange is
14 actually going out and soliciting, as members of Sound
15 Exchange, all sorts of record labels that may not be
16 members of RIAA but want Sound Exchange to administer
17 the performance right for them.

18 Q And in going out into the marketplace and
19 negotiating the 25, or now 26, agreements, I take it
20 it is that broader constituency, that closer to the
21 universe of all record labels in the United States,
22 that is being represented in those negotiations; is

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1 that correct?

2 A Well, actually, it's varied over time,
3 because those agreements have been negotiated over
4 time.

5 Q But those representations comprehend,
6 technically speaking, record companies who are not
7 members of RIAA; is that correct?

8 A Yes.

9 ARBITRATOR VON KANN: Can you clarify one
10 thing for me in reference to Sound Exchange, and we
11 just established that that includes some non-RIAA
12 companies. There's also reference to the RIAA
13 Negotiating Committee. And to be candid, I'm a little
14 unclear of who it is that sits down on the opposite
15 side of the table from a webcaster, whether it is the
16 RIAA Negotiating Committee or whether it is Sound
17 Exchange.

18 MR. RICH: I could suggest that this is
19 the direct subject of testimony of the next witness,
20 at least cross examination, but it's your prerogative.
21 If you want to ask the General Counsel --

22 ARBITRATOR VON KANN: Okay. No, let's

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1 defer.

2 THE WITNESS: I'm happy to answer the
3 question.

4 ARBITRATOR VON KANN: Well, we don't want
5 to steal Ms. Rosen's thunder.

6 (Laughter.)

7 The cross examination is prepared, so we
8 can wait till after lunch.

9 THE WITNESS: Since it's raised, why don't
10 I just indicate. The RIAA began the process of
11 negotiating these licenses through a Negotiating
12 Committee of the companies, all with the idea that we
13 would be forming a group called Sound Exchange that
14 would take over the licensing function. It has taken
15 an enormous amount of effort and time and money to
16 create Sound Exchange, to create the computer programs
17 that will be necessary to process the data and to
18 distribute the royalties and so on.

19 So all of that process was begun by RIAA
20 a couple of years ago, three years ago, at the same
21 time as licensing efforts were underway. And then we
22 finally formed and launched Sound Exchange during the

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1 past year and created a board and so on, which is
2 still being expanded. And so it's a transition from
3 the RIAA Negotiating Committee to a Sound Exchange
4 Negotiating Committee, but it's essentially performing
5 the same function.

6 MR. RICH: As soon as we're ready, I'm
7 going to ask my colleagues to hand out a document
8 we've marked as SX-1, our first cross examination
9 exhibit, which I will represent is a printout from the
10 Sound Exchange web site, which we performed, I guess,
11 last evening; is that correct? Yes.

12 (Whereupon, the above-referred
13 to document was marked as
14 Exhibit No. SX-1 for
15 identification.)

16 THE WITNESS: Do I get to see one?

17 MR. RICH: Indeed.

18 THE WITNESS: Thank you.

19 BY MR. RICH:

20 Q Are you familiar with this web site, Mr.
21 Sherman?

22 A I'm familiar with the web site. I can't

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1 say as I've read what's on them.

2 Q Do you know if the content of the web site
3 is supplied by one or more employees of the RIAA or of
4 Sound Exchange?

5 A By both.

6 Q By both. I take it, as the Chief Legal
7 Officer, you would presume that its content is
8 accurate?

9 A Certainly hope so.

10 Q If you would turn to the third page of
11 this document.

12 A That's the one labeled page 2 of 3 or --

13 Q Yes, the one labeled page 2 of 3. I won't
14 attempt to figure that out. It's headed, "You need a
15 voluntary license if you are dot, dot, dot." Are you
16 with me?

17 A Yes.

18 Q And there follows a series of situations
19 set forth which indicate the need for a voluntary
20 license. Now, again, so that the terminology is
21 clear, what is -- as you would understand it, what is
22 meant by "You need a voluntary license"? What is that

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1 distinguishing from?

2 A From a statutory license. A voluntary
3 license is one that is issued voluntarily by a
4 copyright owner, as opposed to a statutory license
5 which does not require the permission of the copyright
6 owner.

7 Q And am I correct that voluntary licenses
8 fall outside of the purview of Sound Exchange?

9 A Well, there may be a possibility that
10 Sound Exchange will perform a clearinghouse function
11 for voluntary licenses at some point. Right now it's
12 primary focus is the statutory license.

13 Q Let me sharpen my question. Is it correct
14 that Sound Exchange would not perform any role in
15 determining the prices or terms of conditions of
16 voluntary licenses in any circumstance?

17 A Yes.

18 Q And what is the reason for that?

19 A Because these are exclusive rights of
20 competitor organizations, and therefore they have to
21 set their pricing terms individually and not
22 collectively.

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1 Q And I take it you would agree with me that
2 there is no anti-trust exemption for Sound Exchange to
3 engage in the setting of or negotiation of prices and
4 terms with respect to such voluntary licenses, as
5 there is under Section 114 with respect to Sound
6 Exchange's work in relation to the statutory license;
7 is that correct?

8 A Yes. You're talking about material terms
9 and conditions.

10 Q Material terms, prices.

11 A Yes.

12 Q Let's go right to royalty terms, for
13 example.

14 A Yes.

15 Q Okay. And I take it, as well, that --
16 let's just take an example or two here. Let's take
17 the music video situation. Are the rights required to
18 be obtained in relation to the music videos the same
19 as or different than the rights which, say, a
20 streaming radio broadcaster must acquire from the
21 record label?

22 A They're different.

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1 Q How?

2 A They're rights from audio-visual work as
3 opposed to a sound recording. They are exclusive
4 rights as opposed to rights that may be subject to a
5 statutory license.

6 Q Different medium, yes, audio-visual from
7 audio only?

8 A Yes.

9 Q What about 30-second clips, same or
10 different than the form of license which a streaming
11 webcaster would have to acquire from either individual
12 record labels or from Sound Exchange?

13 A Well, as a technical matter, I suppose 30-
14 second clips could be webcast, but, generally, 30-
15 second clips are offered on an interactive basis, and
16 as a result, they would be subject to exclusive rights
17 rather than a statutory license.

18 Q And so when in the last sentence it's
19 indicated under the 30-second clip piece, "Note that
20 offering clips on demand does not qualify for a
21 statutory license," that's tantamount to interactive,
22 is it not?

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1 A That's correct.

2 Q Okay. So it is quite different in nature,
3 that is the nature of that use, as reflected in the
4 very different licensing protocols, initiatives,
5 rights, and obligations that are attendant to it; is
6 that correct?

7 A Very different from what?

8 Q From the statutory license situation and
9 the rights that we're dealing with in this proceeding.

10 A Yes.

11 Q And go down to jukebox on the Internet,
12 there's a reference there again to "Interactive
13 services do not qualify for a statutory license." I
14 take it your testimony would be similar, namely that
15 one is dealing with fundamentally different sorts of
16 copyright rights in relation to the offering of what's
17 termed a jukebox on the Internet than the far more
18 circumscribed rights which are involved before this
19 Panel in this proceeding; is that correct?

20 A Yes. Of course, there's still sound
21 recordings and --

22 Q Of course.

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1 A -- same medium and so on and so forth.
2 It's just a different right.

3 Q At some level you find some similarity.
4 And, of course, digital downloads of music, which
5 appear just ahead of the jukebox reference, are, as
6 well, significantly different in kind, are they not,
7 from the streaming activities and the copyright
8 implications associated with those that we're dealing
9 with in this proceeding; is that correct?

10 A That is correct.

11 MR. RICH: I would offer this document
12 into evidence if there are no objections.

13 MR. GARRETT: No objection.

14 CHAIRMAN VAN LOON: Received.

15 (Whereupon, the above-referred
16 to document, previously marked
17 as Exhibit No. SX-1 for
18 identification, was received
19 into evidence.)

20 BY MR. RICH:

21 Q Now, if you'd turn to page 16 of your
22 written direct testimony, please. Under paragraph

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1 number 2, "Sound Recordings," second sentence, you
2 indicate, "Congress," -- you're referring now, I take
3 it, to the time of enactment of the DPRA in 1995 --
4 you indicate, "Congress effectively exempted analog
5 transmissions, parens, such as over-the-air radio
6 broadcasts, closed parens, from any sound recording
7 performance right." Do you see that?

8 A Yes.

9 ARBITRATOR VON KANN: What page is that
10 one?

11 MR. RICH: I'm sorry, this is page 16 of
12 the written direct testimony, just under paragraph
13 number 2, "Sound Recordings."

14 ARBITRATOR VON KANN: Okay.

15 BY MR. RICH:

16 Q Now, I take it that in fact analog
17 transmissions had already been exempt prior to 1995.
18 That's been established; is that true?

19 A Well, if you regard an exemption as
20 something to which no right was granted, yes, but an
21 exemption is something where there's a right granted
22 and then there's an exemption for it. There was no

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1 right granted here in the first place because of the
2 time in which sound recordings became copyrightable
3 subject matter.

4 Q From the standpoint of one who is engaging
5 in analog transmissions, the legal status was status
6 quo ante, yes? Nothing changed from what preceded
7 1995; is that correct?

8 A For analog transmissions of sound
9 recordings --

10 Q Sound recordings.

11 A -- not musical work.

12 Q Yes. Is that correct?

13 A Yes.

14 Q Okay. So there was no change in status
15 effectuated in 1995, even though, as you style it, as
16 of 1995, because a new right was accreted for certain
17 users, technically speaking, an exemption was
18 therefore appropriate to maintain the status quo; is
19 that correct?

20 A Sure.

21 Q Now, if you turn to page 21 of your
22 statement.

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1 MR. GARRETT: I'm sorry, what page?

2 MR. RICH: Twenty-one. In connection with
3 mechanical licenses to which you testified, there's a
4 footnote, footnote 33, which makes reference to a
5 notice of inquiry with respect to certain issues
6 related to 115 in DPD. Do you see that?

7 THE WITNESS: Yes.

8 BY MR. RICH:

9 Q Could you tell the Panel what that's a
10 reference to in broad strokes?

11 A One of the difficult issues that has
12 arisen from new Internet technology is the merging of
13 the different rights. We've talked before about the
14 performance right, the reproduction right, the
15 distribution right. And we've had The Harry Fox
16 Agency doing reproduction and distribution; we've had
17 the performing right societies doing performances.
18 And they were very different functions, very different
19 types of uses. But with the Internet, it's arguable
20 that all three of those rights are implicated by a
21 single Internet transmission, because it could be
22 characterized as a performance, and in the course of

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1 that performance reproductions are made and
2 potentially a distribution effected.

3 So as a result, there has been uncertainty
4 about which of the appropriate licensing agencies for
5 digital phone or record deliveries on the Internet.
6 We have been unable to resolve this issue to date by
7 negotiation with the music publisher organizations,
8 and we therefore ask the Copyright Office to provide
9 guidance on how DPDs should be licensed for different
10 kinds of subscription services.

11 Q Now, in this marketplace and with respect
12 -- by this I mean the one you just testified to-- and
13 with respect to the mechanical license and DPDs, I
14 take it that the RIAA and its members are in similar
15 shoes, in a sense, to those on my side of this aisle,
16 namely as users, as licensees of copyrighted material;
17 is that correct?

18 A We are users, and we are licensees. That
19 doesn't necessarily mean we take the same legal
20 position, but we certainly are in a similar situation.

21 Q Yes. You are in need of -- in order to
22 avoid copyright infringement exposure, you are in need

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1 of a license; is that correct?

2 A Yes.

3 Q And those licenses are issued by the music
4 publishing industry; is that correct?

5 A Well, as a matter of law, we believe they
6 are issued as a matter of law, without any action
7 necessary by the music publishing industry, but that's
8 one of the issues in dispute.

9 Q And there is, not unlike Section 114 and
10 Section 112 compulsory licensing, a compulsory license
11 mechanism there available to RIAA and its members, is
12 there not, in the event of a failure of negotiation?

13 A Yes. It's the question of whether that
14 compulsory license applies that's at issue.

15 Q Understand. But has RIAA expressed a view
16 whether and to what degree a compulsory license should
17 there apply?

18 A Actually, we've basically reflected the
19 view that there are arguments on all sides and that we
20 need the Copyright Office to issue guidance.

21 MR. RICH: We will offer as our next cross
22 examination exhibit a document that's titled "Petition

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1 for Rulemaking and to Convene Copyright Arbitration
2 Panel If Necessary," a document which I believe we
3 will shortly establish was filed by Counsel for the
4 RIAA in November of the year 2000.

5 (Whereupon, the above-referred
6 to document was marked as
7 Exhibit No. SX-2 for
8 identification.)

9 BY MR. RICH:

10 Q Is this a document you recognize?

11 A Yes.

12 Q Can you identify it for the record?

13 A It is a petition for rulemaking and to
14 convene Copyright Arbitration Royalty Panel, if
15 necessary. This is the document I was referring to
16 where we asked the Copyright Office to help establish
17 more clearly the rules of the road so that all the
18 parties would know what licenses were necessary and on
19 what terms they could be obtained.

20 Q And I take it on the last page, page 16,
21 that's your name appearing as Counsel?

22 A Yes.

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1 Q Now, if you would read the first paragraph
2 of this submission, is that an accurate summary of the
3 business climate that prompted this submission by the
4 RIAA?

5 A Would you like me to read it?

6 Q You can read it to yourself.

7 A Oh. Yes.

8 Q I'd just make reference, Mr. Sherman, at
9 page 4, under the first paragraph after the
10 background, this document asserts in November of 2000
11 the 90 percent figure. Again, it's not a matter of
12 great moment, but that purports to be the
13 representation of RIAA's membership alone -- 90
14 percent.

15 A Okay.

16 Q If it were determined that RIAA's members,
17 as a result either of this process or some other
18 process, were not entitled to avail themselves for
19 some or all of the commercial activities here involved
20 with the compulsory license, what would their options
21 be? What would your members' options be?

22 A They would need to negotiate individual

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1 licenses with each of the thousands of music
2 publishers.

3 Q I take it that would be viewed as a
4 cumbersome task.

5 A Exceptionally.

6 Q Pardon?

7 A Exceptionally.

8 Q Which, I take it, makes the availability,
9 all things equal, of a compulsory license mechanism
10 more desirable, at least from a transactions cost
11 standpoint; is that correct?

12 A Absolutely.

13 Q Now, if you turn to page 12 of this
14 document, first full paragraph, I'm going to read it
15 into the record, quote, "Moreover, the current
16 uncertainty surrounding the applicable royalty rate
17 presents a serious risk to those seeking to create a
18 legitimate business. Although the compulsory license
19 permits the launch of services offering on-demand
20 streams and limited downloads without infringement
21 liability for the activities covered by the license,
22 the risk associated with an uncertain royalty rate

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1 remains substantial." Do you see that?

2 A Yes.

3 Q Is that a statement with which you agree?

4 A Yes.

5 MR. RICH: Offer this document into
6 evidence.

7 MR. GARRETT: No objection.

8 CHAIRMAN VAN LOON: Admitted.

9 (Whereupon, the above-referred
10 to document, previously marked
11 as Exhibit No. SX-2 for
12 identification, was received
13 into evidence.)

14 BY MR. RICH:

15 Q Just for clarification, if you turn to
16 page 24 of your written direct, under paragraph number
17 2(a), first sentence reads, "After passage of the
18 DPRA, a dispute arose over the proper treatment of
19 webcasters who stream sound recordings over the
20 Internet." And then at the bottom of the paragraph
21 you conclude, "Congress resolved the dispute in 1998
22 with the passage of the DMCA."

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1 Now, in your oral testimony, you clarified
2 that there remains a dispute with respect to one
3 subset of webcasters, if you will, namely those,
4 including our clients, who simultaneously stream over-
5 the-air broadcast signals over the Internet. You
6 didn't mean by this statement to suggest that from
7 every perspective that Congress resolved that in 1998;
8 is that correct?

9 A Right. That dispute remains --

10 Q Thank you.

11 A -- just where it was.

12 ARBITRATOR VON KANN: While Mr. Rich is
13 pausing, let me make sure I understand the import of
14 what you're talking about in this petition. If the
15 Copyright Office did that which you seek, can you help
16 me understand a little more clearly what would be the
17 result? What is it precisely that RIAA is trying to
18 achieve in this petition?

19 THE WITNESS: Okay. I should first
20 indicate that the subject matter of that petition,
21 fortunately, is not before this CARP, so you will need
22 not worry about it. The problem that we've run into

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1 is the ability to figure out how copyright law applies
2 to subscription services. Subscription services are
3 the newest kind of offering that record companies want
4 to make available and third parties, including many of
5 the webcasters and companies represented on the other
6 side with whom our labels are doing deals, to provide
7 interactive services to paying customers.

8 One such service would be the ability to
9 select from a menu of hundreds of thousands of songs
10 and have streamed to you any song that you want to.
11 Another is what's called a limited download where you
12 might get a file of the song, but it would only be
13 available for a short period of time, maybe a few
14 days, maybe for a weekend for a party, maybe for as
15 long as you pay the subscription.

16 Those are variations on categories that we
17 have never been able to -- we've never had to deal
18 with before, and therefore it hasn't been clear
19 whether these qualify as general DPDs, incidental
20 DPDs, record rentals or whether they're covered by
21 this compulsory license at all.

22 Another issue is whether --

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1 ARBITRATOR VON KANN: Which compulsory
2 license?

3 THE WITNESS: The compulsory license for
4 DPDs in Section 115 of the copyright law, which is not
5 one of the sections involved in this proceeding.

6 ARBITRATOR VON KANN: Okay.

7 THE WITNESS: So we've been asking for
8 clarification on that issue, and we've asked for it to
9 be done through a rulemaking proceeding so that all of
10 the relevant parties, including the webcast community
11 and other Internet service providers, would be able to
12 participate, along with record companies and music
13 publishers, to establish a uniform interpretation of
14 the law.

15 BY MR. RICH:

16 Q Is it not the case, Mr. Sherman, that the
17 RIAA in that particular context is pressing for a
18 quite inclusive and comprehensive scope of the
19 compulsory license with respect to the so-called open
20 or unclear issues? That is, given its druthers,
21 RIAA's membership would prefer that those activities
22 be encompassed under the 115 license as opposed to

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1 excluded?

2 A We think that that's actually everybody's
3 position. Everybody would like this to be covered by
4 the compulsory license, because everybody recognizes
5 that the transaction costs of song-by-song licensing
6 among tens of thousands of music publishers and
7 thousands of labels for hundreds of thousands of songs
8 simply is impractical. It was the same sort of
9 thinking that led to the creation of a compulsory
10 license. That is the subject of this proceeding. The
11 transaction costs are simply enormous and actually
12 would prevent such a market from taking place.

13 Q And I take it that one aspect of what the
14 RIAA would advocate be encompassed under the 115
15 compulsory license would be the making of ephemeral
16 recordings that sit on server copies to assist
17 subsequent on-demand streaming; is that correct?

18 A We believe that that would be included in
19 a compulsory license that covers DPDs, yes.

20 Q Yes. I apologize to the Panel for the
21 inside baseball quality of much of this, but you will
22 get up to speed over time. It will all become clear

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1 in time.

2 Page 27 of your testimony, please. In the
3 paragraph beginning, "Third," you indicate that
4 Congress imposed several additional conditions that
5 new services like webcasters must satisfy in order to
6 qualify for the statutory license. Do you see that
7 testimony?

8 A Yes.

9 Q Could you give an example or two of the
10 conditions you have in mind?

11 A There were limits on archiving of
12 programs. There were limits on displaying commercial
13 advertisements in conjunction with the performance of
14 particular sound recordings that would convey the
15 impression of an endorsement, and so on.

16 Q Now, in your knowledge of the 106.4
17 musical performing right, covering musical works as
18 opposed to performing rights in sound recordings, is
19 there anything in the Copyright Act of which you're
20 aware of which contains similar limitations on the
21 uses to which a user -- the uses to which a user can
22 make of the musical work that is conditioned on these

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1 kinds of archiving and other limitations?

2 A There are exemptions and limitations in
3 other sections of the copyright law but nothing like
4 what we just described.

5 Q And so if you are a radio broadcaster or
6 broadcast streamer or any webcaster of the type
7 involved in this case, I take it that in so far as the
8 performance of the underlying musical work is
9 concerned associated with the streaming, there are no
10 correlative or corresponding limitations of the type
11 you've identified, is that correct, that pertain to
12 the sound recording performing right? Or to be more
13 precise, for eligibility for a statutory license under
14 the sound recording performing right. Is my question
15 clear or muddled?

16 A Muddled.

17 (Laughter.)

18 Q Okay. I agree. Taking a webcaster's
19 stream, which we all now have determined involves two
20 performances -- at the musical works level and the
21 sound recording level -- for the webcaster to qualify
22 for the statutory license, that is the license fee to

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1 be set in this proceeding, that broadcaster or that
2 webcaster needs to tow the line, so to speak, with
3 respect to these various conditions, correct?

4 A Yes.

5 Q Is there any corresponding limitation
6 imposed on that broadcaster in order to avail itself
7 of the effectively compulsory ASCAP or BMI license, if
8 it wishes to do so, in connection with using a musical
9 work?

10 A Not that I'm aware.

11 MR. RICH: I believe I'm done. That
12 concludes my questions. Thank you.

13 CHAIRMAN VAN LOON: You're next Mr. Kirby.

14 MR. KIRBY: I hope so, Your Honor.

15 BY MR. KIRBY:

16 Q Mr. Sherman, I'm Tom Kirby. Good morning.

17 ARBITRATOR VON KANN: I'm sorry, Mr.
18 Sherman. Could I just have a minute.

19 (Whereupon, the foregoing matter went off
20 the record at 11:48 a.m. and went back on
21 the record at 11:53 a.m.)

22 CHAIRMAN VAN LOON: We understand that an

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1 issue may have developed during the break when we were
2 off the record.

3 MR. JACOBY: Yes. Mark Jacoby. Let me
4 speak to the issue since I observed it, and Arbitrator
5 Gulin was in the room, so he observed it as well.
6 During the break, as people went out to the restroom,
7 Steven Marks went over to his colleague, Mr. Sherman,
8 and began chatting with him at the witness table.
9 This is in the midst of his examination, indeed in the
10 midst of his cross examination. We think this should
11 be the subject of a ruling by the Panel to ensure that
12 the normal rules are followed and that there should
13 not be any kinds of conferences of that type while
14 someone is on the witness stand, even during a
15 restroom break or any other break, for that matter.

16 ARBITRATOR GULIN: Or if a witness is
17 carried over from one day to the next, he can't
18 discuss testimony with his attorney? That's what
19 you're asking?

20 MR. JACOBY: Yes.

21 ARBITRATOR GULIN: Okay.

22 ARBITRATOR VON KANN: I think it is worth

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1 spending a minute to clarify this and establish a rule
2 that will obviously apply to both sides throughout.

3 MR. JACOBY: Precisely.

4 ARBITRATOR VON KANN: And people need to
5 think through a little bit what straightjacket they
6 want to put on themselves with respect to witnesses of
7 this sort who are experts. This witness was qualified
8 as an expert in using copyright law. We typically
9 have somewhat different rules about expert witnesses
10 versus lay witnesses, so I don't have any great
11 feeling about what rule we apply, but I think
12 everybody needs to think through a little bit what
13 precisely that might mean in the context of expert
14 witnesses who might carry over from day to day and so
15 on.

16 MR. JACOBY: Well, in this particular
17 case, bear in mind it's a party expert witness; it's
18 not an independent expert witness.

19 ARBITRATOR VON KANN: Right.

20 MR. JACOBY: Beyond that, I think the
21 critical point here is if we're in the midst of a
22 cross examination, that rule, I believe, should be in

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1 effect. I don't think it needs to apply if someone's
2 direct examination has been concluded but the cross
3 has not begun. That limitation I don't think is
4 necessary in that situation. But while someone is in
5 the midst of cross, if the proceeding is adjourned,
6 whether for a break or overnight, the witness should
7 not be consulting with anybody about his testimony.

8 ARBITRATOR VON KANN: Is that a rule, Mr.
9 Garrett, that you'd like to embrace?

10 CHAIRMAN VAN LOON: Could you explain your

11 --

12 MR. GARRETT: I have to say that in past
13 CARP proceedings that I've been involved in, those
14 strictures that would normally apply in other places
15 haven't been applied here. I'm obviously prepared to
16 follow whatever the Panel thinks is appropriate. But
17 I think the most important thing is that none of us
18 wants to give the impression that we're doing
19 something that is untoward, that the Panel finds to be
20 unfair or prejudicial in some way here. So I'd just
21 like to have some definite guidelines established
22 here, and I'll be happy to live by them.

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1 I don't think that what Mr. Marks did was
2 in any way inconsistent with what has normally been
3 done in past CARP proceedings. Mr. Jacoby has a
4 different view from a perspective of his proceedings,
5 and I understand that, but I think it is definitely an
6 issue that we should address here.

7 ARBITRATOR VON KANN: Focusing more
8 prospective than retrospectively, would you object if
9 the rule that Mr. Jacoby proposed were hence forth put
10 in place?

11 MR. GARRETT: Well, I guess I need to be
12 certain exactly what that rule is here.

13 ARBITRATOR VON KANN: Why don't you
14 articulate it again?

15 MR. JACOBY: Well, I thought it was fairly
16 clear. What I was saying was that the witness should
17 not be conferring with anybody, including his counsel,
18 if his cross examination is in process, whether it is
19 adjourned by reason of a break during the day or
20 overnight because the witness has not been concluded.

21 MR. GARRETT: Can the witness confer with
22 counsel at the conclusion of cross examination before

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1 redirect?

2 MR. JACOBY: Yes. I don't think we have
3 a problem with conferring with counsel in that
4 situation.

5 ARBITRATOR VON KANN: So it's just during
6 the course of cross.

7 MR. SCHECHTER: And I think he also said
8 there could be conference after direct but before
9 cross. I think it's in the middle of an examination.

10 MR. JACOBY: Yes. It's the middle of --
11 yes.

12 MR. SCHECHTER: So at each stage then it
13 ceases. That is the proposal.

14 MR. JACOBY: That's correct.

15 MR. GARRETT: I have no problem with that
16 rule.

17 THE WITNESS: I mean I think your point
18 about an expert is sensible. I mean if, for example,
19 I were to say, "Gee, what was that section again that
20 covered that right," and I was reminded of it, it
21 isn't as though this is what I saw or heard at an
22 accident, it's just information that enables me to

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1 give my testimony better as an expert. So if you want
2 this restrictive rule, that's fine. I just wonder
3 whether it's going further than it needs to purposes
4 of ordinary testimony.

5 MR. JACOBY: Well, I don't know if Mr.
6 Sherman is now acting in his capacity as an expert, a
7 witness, a client or what, but it's interesting --

8 MR. GARRETT: He pays the bill so whatever
9 he wants.

10 MR. JACOBY: It's interesting to note the
11 multiple roles he's able to achieve in this
12 proceeding.

13 ARBITRATOR VON KANN: The rules would
14 subject, I suppose, to an exception that, for example,
15 if on a break, Mr. Sherman said to you, "I want to go
16 back and ask Marks what that section was, because I
17 forgot it," and you said, "Sure, go ahead, ask it;
18 it's all right," I mean in any given instance there
19 would be the right, I suppose, to ask the other side
20 for leave.

21 MR. JACOBY: You can always confer with
22 counsel and agree upon it. That would obviously

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1 supersede any objection that we would make if we
2 consented to any such discussion. But why it would be
3 with Mr. Marks, I'm not sure, but that's another
4 question. I'm not asking to inquire into what their
5 discussion was about. I think we need to have a rule
6 going forward that makes sense for all the parties and
7 for the tribunal.

8 And I think that in terms of -- I think we
9 have, sounds like, a reasonable approach to this. If
10 I took the clarification to be --

11 MR. SCHECHTER: It was just to understand
12 what the proposal was.

13 MR. JACOBY: Oh, I see. Okay. Well, then
14 I guess we have to know whether or not the proposal
15 makes sense.

16 CHAIRMAN VAN LOON: In response to the
17 request for a guideline, the Panel is happy to adopt
18 the proposal, which we understand not to be objected
19 to, that during cross, a witness would not consult
20 with counsel or other parties. At the conclusion of
21 cross and for redirect, that may be done, and as
22 always, with consent of counsel on an individual

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1 basis, there could be exceptions arranged by the
2 parties.

3 MR. GARRETT: There is no expert exception
4 here, except with the consent of counsel.

5 CHAIRMAN VAN LOON: That's our bright line
6 test.

7 MR. SCHECHTER: And you left out direct.

8 ARBITRATOR VON KANN: During cross. This
9 rule only applies to cross.

10 MR. SCHECHTER: Okay. Thank you.

11 ARBITRATOR VON KANN: During cross a
12 witness may not consult.

13 MR. SCHECHTER: Thank you.

14 ARBITRATOR GULIN: Before you start, I
15 just had one question, a couple questions maybe, with
16 respect to the last few questions asked by Mr. Rich.
17 Mr. Rich was talking to you about the fact that the
18 services are subject to certain limitations under the
19 114 statutory license, such as the one you gave an
20 example of -- they can't play a commercial during the
21 playing of a song.

22 THE WITNESS: They can't --

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1 ARBITRATOR GULIN: Play an image
2 indicating there's some connection or some endorsement
3 by the performer. And that these limitations don't
4 exist with respect to the performance right in musical
5 works.

6 THE WITNESS: Correct.

7 ARBITRATOR GULIN: Now the performance
8 right in the musical works, though, are not subject to
9 a statutory license, are they? They're negotiated
10 with the performing rights societies.

11 THE WITNESS: That's correct.

12 ARBITRATOR GULIN: So those limitations
13 could be negotiated --

14 THE WITNESS: They could be.

15 ARBITRATOR GULIN: -- if these societies
16 wanted them.

17 THE WITNESS: Absolutely.

18 MR. RICH: Judge Gulin, if I may, the only
19 point I was making was this Witness said there's a
20 strong analogy to the role played by the ASCAP consent
21 decrees. If our clients were to the ASCAP rate court
22 of the BMI rate court and say, "Fix a reasonable fee

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1 for the activities we do -- streaming over the
2 Internet -- there would be no corresponding
3 limitations with respect to the scope of their
4 activities in connection with the fee-setting process
5 that tribunal would engage in. That's the only point
6 I was trying to establish.

7 THE WITNESS: But that's subject to
8 ASCAP's desires. I mean ASCAP could decide that they
9 want to impose those kinds of conditions, and then it
10 would be up to the rate court as to whether those were
11 reasonable terms and conditions.

12 ARBITRATOR GULIN: Well, why don't we cut
13 if off there and come back to it later?

14 BY MR. KIRBY:

15 Q Mr. Sherman, I'm still Tom Kirby.

16 (Laughter.)

17 And in light of what just happened, I'd
18 like to explore a little bit more what your role is as
19 you sit here today. You described yourself as an
20 expert witness. I nodded during the moment that you
21 were sworn in, but what do you understand your
22 obligation to be to the tribunal here?

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1 A To present truthful and accurate testimony
2 about music copyright law.

3 Q The truth, the whole truth, and nothing
4 but the truth?

5 A Exactly.

6 Q Okay. Now, I assume that when you left
7 Arnold & Porter you remained a member of the bar; is
8 that right?

9 A Yes.

10 Q And you are, at this point, the Chief
11 Legal Advisor to RIAA; is that correct?

12 A Yes.

13 Q They're your client.

14 A Yes.

15 Q All right. And they were your client at
16 8:30 this morning?

17 A Yes.

18 Q And will be, you hope, at the end of the
19 day.

20 A Yes.

21 Q And we all expect that to be so.

22 MR. GARRETT: I'm the only one who has to

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1 worry about that.

2 (Laughter.)

3 BY MR. KIRBY:

4 Q My first question about your role has to
5 do with this: It would hardly be consistent with the
6 oath that you took for you to describe copyright law
7 in one way to this tribunal and in a different way to
8 your client, would it?

9 A Yes.

10 Q So we can understand that all of the
11 testimony that you gave here today is the same legal
12 advice that you have given or would give to your
13 client if the issue arose.

14 A Well, I don't disclose the legal advice
15 that I give to my client.

16 Q Well, that's where I'm going. Are you
17 asserting that you're preserving the attorney-client
18 privilege with respect to the subject matter and all
19 of the testimony as to which you just raised your hand
20 and swore to tell the truth, the whole truth, and
21 nothing but the truth?

22 A I mean everything that I explained here I

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1 think is black letter copyright law that is really not
2 the subject of a lot of dispute. I think where there
3 has been dispute, I've indicated that there are
4 differing views and that the law is unclear. I give
5 advice to my clients about copyright law that has not
6 been the subject of my presentation today, and I'm
7 certainly not waiving attorney-client privilege as to
8 any of that.

9 Q But to the extent that you have testified
10 here today, and as to the subject matters you've
11 offered to testify here today, your testimony would be
12 the same before this tribunal as it would be if you
13 were giving legal advice to your client on that
14 subject matter; is that correct?

15 A Yes.

16 Q All right. So as a practical matter, we
17 know -- strike that. Now, as a lawyer for your
18 client, you have certain ethical obligations to the
19 client; is that right?

20 A Yes.

21 Q And as you sit here today, you owe RIAA a
22 duty of utmost loyalty, don't you?

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1 A Yes.

2 Q And to the extent that there are possible
3 shades of interpretation in the law, you, as RIAA's
4 lawyer sitting there, have a duty to advocate the
5 position that's most favorable to RIAA, don't you?

6 A I think my first duty is to speak
7 truthfully, according to the oath that I took.

8 Q But within the bounds of truth, you have
9 a professional ethical obligation to advocate the
10 position that is most favorable to your client, don't
11 you?

12 MR. GARRETT: Your Honor, I'm going to
13 object to this line of questioning here. I think the
14 witness has already indicated his views on what his
15 ethical obligations are. He's not here as an expert
16 on ethics in any way. None of the questions that Mr.
17 Kirby has asked, in any way, go to specific testimony
18 that Mr. Sherman has given here. I believe the line
19 of questioning is objectionable.

20 MR. KIRBY: He was prepared to answer, and
21 I think that would have ended that line of
22 questioning, Your Honor. But it goes fundamentally to

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1 how this Panel is supposed to understand this
2 testimony. You have a gentleman sitting here in the
3 witness chair who is a lawyer for the primary party in
4 interest who, during a discussion on a procedural
5 matter, chimes in and presents his argument on how
6 things ought to go. And I think it's fair to clarify
7 exactly the nature of his role here today.

8 ARBITRATOR VON KANN: I think we picked up
9 the fact that he's had a 26-year association with the
10 RIAA.

11 (Laughter.)

12 And does not walk in here as a
13 disinterested stranger to the matter.

14 MR. KIRBY: And that's my point, Your
15 Honor.

16 ARBITRATOR GULIN: All right. Well, we
17 have an objection pending. Do we want to rule on
18 that?

19 MR. KIRBY: I'll withdraw the last
20 question on the point, Your Honor.

21 CHAIRMAN VAN LOON: Thank you.

22 BY MR. KIRBY:

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1 Q In your testimony, you referred at one
2 point to a royalty -- I think it's the 114(g) royalty
3 that goes to performance. Do you at least remember
4 that performers do get a royalty under 114(g)?

5 A Yes.

6 Q All right. And there's a reference in
7 your written testimony to the statute providing that
8 that royalty be divided with the performer. Do you
9 remember that?

10 A Yes.

11 Q Okay. Now, I take it you got a copy of
12 the statute there in front of you.

13 A Yes.

14 Q Okay. Is there anything in the statute
15 that forbids the featured performer from contractually
16 agreeing with the record company to assign that
17 royalty to the record company?

18 A I don't know whether there's anything that
19 forbids it, but there's an affirmative statement about
20 how the receipts shall be allocated. So it's a
21 question of interpretation as to which is dominant.

22 Q If you look up the section above the

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1 section that deals with the featured performer, you'll
2 see, for example, the section dealing with the
3 background vocalists. Do you see that?

4 A Yes.

5 Q What's the language that's used there in
6 describing what happens to the royalty?

7 A "Two and a half percent of the receipts
8 shall be deposited." Is that what you're referring
9 to?

10 Q Yes, just read that.

11 A "Two and a half percent of the receipts
12 shall be deposited in an escrow account, managed by an
13 independent administrator jointly appointed by
14 copyright owners of sound recordings and the American
15 Federation of Musicians or any successor entity."

16 Q All right. That's all I wanted. Now,
17 moving down to the section that deals with featured
18 artists, would you read the equivalent provision
19 there, if there is one?

20 A "Forty-five percent of the receipts shall
21 be allocated, on a per sound recording basis, to the
22 recording artist or artists featured on such sound

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1 recording."

2 Q All right. Now, in your role as an expert
3 on music copyright law, what is your understanding?
4 Can the featured artist assign the right to receive
5 that royalty to a record company?

6 MR. GARRETT: Your Honor, I hate to object
7 again here, but this goes back to an issue that we
8 discussed yesterday here about tag teams for cross
9 examination. I have no problem, as I say, in having
10 multiple parties on their side cross examining
11 witnesses as long as it relates to the specific
12 interest of their clients here. The questions that
13 Mr. Kirby is asking are all questions that could just
14 as easily have been asked by Mr. Rich. They are not
15 issues that relate specifically to broadcasters, which
16 is who Mr. Kirby represents. And I think it's unfair
17 and inappropriate to essentially have, as I say, tag
18 teams of lawyers doing the cross examination.

19 MR. KIRBY: First, as he concedes, it does
20 deal directly with my clients' interests. Secondly,
21 given the quick schedule that we're following, various
22 counsel don't have a full opportunity to consult and

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1 coordinate. Thirdly, my clients retained me to ask
2 the questions that I think are important on cross
3 examination. And the fact that Mr. Rich made a
4 different judgment doesn't detract from my clients'
5 right to have me cross examine a witness on issues of
6 direct relevance to my clients' interest. And there's
7 no denial that that's what this is, and that's what
8 I'm doing.

9 My understanding was yesterday that we
10 were going to have no more than four cross examiners.
11 We were going to try to avoid duplication. And the
12 gist of his objection is I'm not duplicating; it's
13 something that Mr. Rich didn't even ask about. And
14 I'm simply pursuing it because in my professional
15 judgment the interests of my client require me to do
16 it.

17 CHAIRMAN VAN LOON: Announcing the
18 consensus of the Panel, the objection is overruled.
19 We believe that that was what we discussed and what we
20 agreed to yesterday that there would be up to four
21 different cross examinations by different counsel.
22 And if there's a need for us to clarify or elaborate

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1 on that, we can do that. But we thought that the
2 record was clear yesterday that that's where we had
3 come to.

4 ARBITRATOR VON KANN: I think that at
5 least my understanding of some of what was discussed
6 yesterday is to the effect that while there may be
7 separate interests on that side, they also have some
8 common interests. And I don't think -- I certainly
9 didn't understand the discussion to mean that after
10 the first examiner nobody in successive groups could
11 talk about matters of common interest. Now it might
12 be inappropriate for Mr. Rich to start asking
13 questions that were only of interest to NPR; I think
14 we might cut that off. But things that pertain to his
15 client, and may also pertain to others, are fair game,
16 it seems to me, in his cross.

17 CHAIRMAN VAN LOON: Please continue.

18 THE WITNESS: Could you repeat the
19 question?

20 BY MR. KIRBY:

21 Q In your professional opinion, as an expert
22 on music copyright law, is there anything in that

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1 section that prevents a featured artist from agreeing
2 to assign to a record company any royalties that
3 otherwise would go to the artist under that section?

4 A This is one of those areas of law that is
5 unclear, and people have different views as to whether
6 they can or they cannot, whether -- even if they
7 cannot, whether it could be allocated to a royalty
8 account as opposed to something else. It's just not
9 clear from the statute.

10 Q Have you, on any prior occasion, expressed
11 an opinion on that subject?

12 A I have.

13 Q What was that opinion?

14 MR. GARRETT: I'm sorry. Is he is asking
15 about opinion to his client or is he asking about an
16 opinion somewhere in the public, at a seminar or
17 something of that nature?

18 MR. KIRBY: He's here to testify as to his
19 opinions on the law, and I want to know what his
20 opinions on the law are. He said his testimony here
21 would and should be the same as what he had told his
22 client. If he's expressed an opinion, I'm entitled to

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1 know what that opinion is. If he doesn't want to do
2 it, he should withdraw his testimony and sit down.

3 ARBITRATOR GULIN: Perhaps a better
4 question is, do you have an opinion, and we can take
5 it from there.

6 MR. KIRBY: All right.

7 BY MR. KIRBY:

8 Q You have expressed an opinion previously.
9 I'm just simply asking for a yes or no answer. Is
10 that right?

11 A Yes.

12 Q Does that opinion remain your opinion
13 today?

14 A Yes.

15 Q What is that opinion?

16 A Well, my opinion is that the law does not
17 specifically -- actually, the question you asked was
18 whether there could be an assignment. And I believe
19 my opinion has been that one cannot assign to a record
20 company the right that is specifically conveyed here.

21 Q Can the record company look to that
22 payment to recoup contractual obligations that the

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1 artist has undertaken with the record company?

2 A That is another and related issue that is
3 a gray area in the law, and we have basically agreed
4 to the fact with the artists' representatives that
5 there are differing interpretations possible. Our
6 companies are proceeding on the basis that the money
7 is not recoupable but should be paid directly, and we
8 are in ongoing discussions with the artists about how
9 to address this issue for the future.

10 Q All right. So at least can we agree that
11 there's no clear statutory guarantee that that money
12 will end up with the featured artist?

13 A Well, I guess that depends on what you
14 mean by "end up with." If an artist owes a debt and
15 this money is used against that debt, in one way or
16 another it's ending up with the artist. So under that
17 circumstance, I think it's clear that the money will
18 end up with the artist. I think it's simply an issue
19 of whether it's cash or whether it's a credit.

20 ARBITRATOR GULIN: Do I understand this to
21 mean it's an issue of whether it's recoupable?

22 THE WITNESS: Yes, that's the issue.

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1 ARBITRATOR GULIN: Okay. So what you're
2 saying is at this point it's unclear whether in fact
3 it is recoupable.

4 THE WITNESS: Right.

5 ARBITRATOR GULIN: Okay.

6 CHAIRMAN VAN LOON: So you're proceeding
7 on the basis -- your company is proceeding on the
8 basis that it's not.

9 THE WITNESS: That it's not, that's
10 correct.

11 BY MR. KIRBY:

12 Q But they're also negotiating to figure
13 some way that they can get access to it; is that
14 right? I believe you said they were under discussions
15 with the artist representatives on this point.

16 A Not for how they could get access to it,
17 but rather what should be the rule that would apply in
18 the future, whether legislation needs to be clarified,
19 whether there are other ways to accomplish this
20 through collective bargaining agreements and so on and
21 so forth.

22 Q Okay. So it would be a mistake for this

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1 Panel -- to the extent that any of this is relevant
2 that has been brought up in RIAA's case, it would be
3 a mistake for this Panel, in reaching its decision, to
4 assume that necessarily this money will not be
5 recoupable.

6 A I don't think it would be a mistake. I
7 would just say that it isn't crystal clear that it
8 will remain that way, even though it is not being
9 regarded as recoupable now.

10 Q All right. Now you recall your testimony
11 concerning the reason that Congress gave a different
12 treatment to broadcast radio than it gave to digital
13 transmissions over the Internet. Do you remember
14 talking on that subject?

15 A Yes.

16 Q And you discounted the explanation that
17 broadcast radio was not subjected to the royalty we're
18 talking about here today because of the promotional
19 value of radio broadcast. Do you remember that?

20 A Yes.

21 Q It's a fact, isn't it, that that rationale
22 for the status of broadcast radio appears in committee

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1 reports associated with the bill, doesn't it?

2 A That's right, because there had to be some
3 explanation for why broadcasters were being carved out
4 of a royalty that was otherwise being applied to other
5 new services.

6 Q And you're aware that various members of
7 Congress have, from time to time, articulated that
8 rationale, aren't you?

9 A Yes.

10 Q Is it your testimony here today that all
11 of that was simply a disingenuous attempt to mislead?

12 A My testimony is it was an attempt to
13 rationalize a distinction that otherwise similarly
14 situated services so that it could be justified. I
15 wouldn't call it disingenuous; I would just call it
16 convenient.

17 Q Was that in fact a basis for Congress'
18 decision not to impose this royalty obligation on
19 broadcast radio?

20 ARBITRATOR VON KANN: That's
21 epistemological.

22 (Laughter.)

1 THE WITNESS: Yes, it really is.

2 MR. KIRBY: Well, he started down this
3 road, Your Honor. I agree that, perhaps, it was
4 unwise. But we've got a witness telling us why
5 Congress did things, and now I want him to tell us
6 that he really means it. And when Congress said in
7 official reports, "We're doing it because of the
8 promotional value of broadcast radio," they were just
9 pulling the wool over the public's eyes. Is that your
10 testimony?

11 THE WITNESS: My testimony is that there
12 was a political understanding between the broadcasters
13 and the record labels, as well as the performing
14 rights societies and the mechanical rights societies
15 and the satellite music services and everybody else
16 about what the scope of this legislation would look
17 like.

18 Copyright legislation, historically, has
19 been legislation arrived at by consensus and by
20 compromise. Indeed, the chairmen of the various
21 subcommittees call the parties into a room, and they
22 make them sit around a table and negotiate with each

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1 other until they arrive at some consensus view. And
2 then there is negotiation over the report language
3 that helps explain it. This report language reflects
4 the political compromise that was reached with respect
5 to grandfathering broadcasters.

6 BY MR. KIRBY:

7 Q Was that report language misleading, in
8 your judgment?

9 A I don't think it accurately reflected the
10 political situation.

11 Q I think we understand what you're saying.

12 ARBITRATOR VON KANN: Can I ask about this
13 report, this magic report that we don't have in front
14 of us? Maybe at some point --

15 THE WITNESS: It's actually in my
16 testimony -- my exhibit.

17 ARBITRATOR VON KANN: Okay. I'm sorry.
18 Does that report explain why the rationale isn't
19 equally applicable to the holders of musical works?

20 THE WITNESS: No, it does not.

21 BY MR. KIRBY:

22 Q Let's turn to that, though, if we could.

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1 The musical works royalty -- there is a statutory
2 royalty for musical works; is that right? The
3 composers have a statutory right to a royalty when a
4 CD is sold; is that right?

5 A Yes, but we're talking here about
6 performances by broadcasters.

7 Q I understand that. I asked you, as cross
8 examiner, is there such a royalty made available
9 statutorily?

10 A Yes.

11 Q Okay. And that's Section 115; is that
12 right?

13 A Yes.

14 Q And under Section 115, approximately what
15 does the composer end up with as a royalty when a
16 compact disk is sold?

17 A At present, I believe the rate is 7.55
18 cents per track, per CD.

19 Q So 60 to 70 cents in that ball park; is
20 that right?

21 A Well, there are about an average of 13
22 songs on a CD, so it would be almost eight times 13 --

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1 75, 85 cents, in that range.

2 Q All right. In that range. Okay. Do you
3 happen to know what the typical royalty is that the
4 performing artist -- the typical payments that the
5 performing artist ends up with as a result of a sale
6 of a CD?

7 A It varies very substantially from new
8 artist to established artist, and there's a wide
9 range.

10 Q But is there testimony in RIAA's case that
11 typically it's in a range that would be two and a half
12 to three times the amount that goes to the composer?

13 A I don't know whether there's testimony in
14 the case to that effect.

15 Q All right. And so you wouldn't know
16 whether or not the promotional value that flows from
17 radio play has a much greater benefit to the artists
18 and record companies than it does to the composers.
19 Do you have an opinion on that?

20 A I would say that the benefit is exactly
21 the same. Artists are treated very differently from
22 composers. Composers get paid from the first CD sale

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1 regardless of whether that CD loses money. Artists
2 basically recoup the costs of the making of the CD
3 before they begin earning royalty payments. So
4 there's an entirely different relationship between a
5 label and an artist and a label and the music
6 publisher. The music publisher benefits from all the
7 sales of the CD by getting mechanical royalties from
8 the get go.

9 Q Right. For purposes of my question, let's
10 put the economic benefit to the composers over here in
11 this basket, and let's put the economic benefit to the
12 performing artists and the record companies over here
13 in this basket. Now, to the extent radio promotion
14 results in additional CD sales, which one of those
15 baskets is going to get more money put in it,
16 typically?

17 A There's really no answer to that question,
18 because it depends on the deal. In other words --

19 Q The deal between whom?

20 MR. GARRETT: I'm sorry. Let the Witness
21 finish his answer, please.

22 MR. KIRBY: Well, I'm not sure the Witness

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1 is actually answering my question, but the deal
2 between whom?

3 THE WITNESS: Between the artist and the
4 record company.

5 BY MR. KIRBY:

6 Q Okay. But we put them in one basket. So
7 we've got over here the composers, and here we've got
8 the record company and the artist in one basket. And
9 my question is comparing this basket, the composer
10 basket, to what I've admittedly constructed here, the
11 record company/performing artist basket, typically,
12 when an additional CD is sold, which one of those
13 baskets gets more money in it?

14 A Well, there might be a credit that is
15 greater in amount in the artist basket. There is an
16 actual payment, not a credit, but an actual payment
17 into the composer's basket. In addition, the composer
18 gets performance royalties from that radio air play,
19 and performance royalties represent a very substantial
20 portion of the composer's total stream of revenues,
21 whereas the artist gets nothing from the performance
22 of that radio air play. So it may well be that the

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1 composer is doing better from radio air play than
2 artists.

3 Q Well, you keep talking about "may well
4 be," and I keep asking you to address typical. Now,
5 if you're not in a position to address typical, tell
6 me so. But my question is with a typical additional
7 CD sale that puts 70 or 80 cents in the composer's
8 basket, how much money goes into the basket containing
9 both the record company and the artist? Isn't it
10 several dollars, typically?

11 A Both the record company and the artist?

12 Q Yes. There's a single basket there,
13 because -- there's my question. Which basket gets
14 more money when an additional CD is sold, typically?

15 A The artist and record company component
16 obviously gets more cash.

17 Q And, typically, it's considerably more
18 cash, two and a half or three times more; isn't that
19 right?

20 A Well, it would be more than two and a half
21 to three times more if you're including the record
22 company, sure.

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1 Q All right. That's fine. So doesn't that,
2 perhaps, suggest a reason why Congress might have
3 thought that the promotional value to the composers
4 could be analyzed differently than the promotional
5 value to the performer and the record company?

6 A Well, let's put it this way: If that's
7 what Congress thought, they certainly didn't share it
8 with me, and I don't recall having any discussions
9 with anybody in Congress who thought that way at the
10 time.

11 Q Okay. You refer to copyright as
12 consisting of a bundle of rights. Do you remember
13 that?

14 A Yes.

15 Q And, in fact, different creative persons
16 get different bundles of rights under the copyright
17 law; is that right?

18 A Yes.

19 Q Okay. And it's up to Congress. It's
20 Congress' job to decide what bundle of rights should
21 make up the copyright for any particular creative
22 function; is that right?

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1 A Yes.

2 Q Okay. Now, do you have an opinion as to
3 the fundamental guiding principle that Congress is to
4 look to when it is creating a bundle of rights for a
5 particular creative act?

6 [No response.]

7 Q Let me ask that another way. Let me ask
8 that another way. Are you familiar with the Harper &
9 Rowe decision, Harper & Rowe v. Nation, back in 1985?

10 A Yes.

11 Q Okay. And I realize it's not fair to
12 simply ask you what that decision said, so let me ask
13 you if you recall this language from that decision?
14 This is in Justice O'Connor's opinion. "The immediate
15 effect of our copyright law is to secure a fair return
16 for an author's creative labor. But the ultimate aim
17 is, by this incentive, to stimulate the creation of
18 useful works for the general public good." Does that
19 principle sound familiar to you?

20 MR. GARRETT: Can the Witness have a copy
21 of that decision?

22 MR. KIRBY: If he wants to take a look at

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1 that decision, he's going to have to put up with my
2 marginal scribbling. There you go. Here's what I was
3 reading from, here.

4 MR. GARRETT: Were you quoting from the
5 majority opinion?

6 MR. KIRBY: Yes, that's Justice O'Connor's
7 opinion. But, really, my question is not so much did
8 Justice O'Connor say that, but is that your
9 understanding of the fundamental constitutional
10 rationale for copyright law?

11 THE WITNESS: It's often stated in
12 opinions, yes.

13 BY MR. KIRBY:

14 Q And doesn't the Constitution, in fact,
15 indicate that providing an incentive to creation and
16 advancement is why you have copyright? Isn't that
17 what the Constitution says?

18 A Yes.

19 Q You probably could quote the phrase,
20 couldn't you?

21 A Don't test me.

22 (Laughter.)

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1 Q Okay. But I'll bet you could. So when
2 Congress goes to decide what sort of copyright it
3 ought to create for the performing artists in the area
4 we're talking about here today, there's no natural law
5 that dictates what bundle of rights Congress has to
6 give that performer, is there?

7 A Well, you have to look at what Congress
8 actually did. In 1976, Congress created a set of
9 rights and basically granted all of those rights to
10 all copyright owners with the exception of sound
11 recordings. So every -- Congress, in other words,
12 made the decision that every copyright right that had
13 physical applicability, in other words, could this be
14 displayed, could this be performed, but any work that
15 could be performed had a performance right with the
16 sole exception of sound recordings.

17 Q Understand, but that's Congress' job,
18 isn't it, to decide what bundle of rights to give
19 particular creative persons?

20 A Yes. It's a curious coincidence that they
21 happened to choose that every copyrighted work
22 deserved a performance right except sound recordings.

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1 And if I recall correctly, they said that they didn't
2 want to disturb the historical relationship between
3 radio broadcasters and owners of sound recordings.

4 Q All right. And we've discussed the way
5 money gets divided under that historical relationship.
6 But my point is this: That Congress didn't give the
7 sound recording right and then take it away in
8 different transactions. What Congress did was
9 simultaneously to create a right and create its
10 limits; is that right?

11 A They did that in 1972. They gave a
12 limited right in response to the problem of record
13 piracy.

14 Q But to the extent that Congress has
15 defined the bundle of rights that the performers and
16 record companies hold, that's Congress' proper
17 function, correct?

18 A Yes.

19 Q And the Constitution indicates that in
20 performing that function Congress should be guided by
21 crafting the incentives that will produce the level of
22 performance that Congress deems desirable; is that

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1 correct?

2 A That is the theoretical basis on which it
3 proceeds.

4 Q Thank you. And I'll recoup my exhibits.

5 CHAIRMAN VAN LOON: And while you're doing
6 that, and with an eye toward the clock, we ask whether
7 you are close to the end of your cross or --

8 MR. KIRBY: I am at the end of my cross.

9 CHAIRMAN VAN LOON: You are. Excellent.
10 Timing it within three and a half minutes is greatly
11 appreciated. So at this point, we will adjourn for
12 one hour for a lunch break and be back at 1:30.

13 MR. GARRETT: Could I ask is there any
14 more cross of this Witness?

15 CHAIRMAN VAN LOON: Yes, good question.
16 Is there -- yes. Ms. Leary indicates yes.

17 (Whereupon, the foregoing matter went off
18 the record at 12:32 p.m. and went back on
19 the record at 1:34 p.m.)

20

21

22

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:34 p.m.)

BY MS. LEARY:

Q Good afternoon, Mr. Sherman.

A Good afternoon.

Q I just have a couple of questions. You are aware that Section 118 provides --

CHAIRMAN VAN LOON: Excuse me. If I could interrupt just for a second, and this is really on behalf of everyone. We have been asked several times that we make every effort to keep our voice loud enough so that everybody in the room can hear, particularly people in the back it's difficult. It's very easy for us to drop into sort of a colloquy up here, the front row and the bench. So we would ask that everyone do that, in part, so that the rest of the world can know the wisdom and truth that you're propounding.

MS. LEARY: Thank you.

BY MS. LEARY:

Q Taking it from the top, you are aware that Section 118 provides a compulsory license for the

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1 public performance of musical works by public
2 broadcasters?

3 A Yes.

4 Q And you're also aware that public
5 broadcasting and certain of the performing rights
6 societies recently availed themselves of that
7 statutory license by invoking a CARP?

8 A No.

9 Q Are you familiar with the decision by our
10 CARP Panel in 1998 pertaining to fees for the public
11 broadcasting company?

12 A No.

13 Q Are you aware that the statutory license
14 at issue here contains certain restrictions on the
15 limitations or the number of selections that could be
16 played by webcasters from any single CD in any three-
17 hour period?

18 A Yes.

19 Q For example, no more than three selections
20 from a single CD could be played, and they could not
21 play more than two in a row; is that correct?

22 A Yes.

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1 Q So if National Public Radio --

2 ARBITRATOR VON KANN: Is this the so-
3 called "complement?"

4 THE WITNESS: Yes.

5 MS. LEARY: The sound compliment --

6 THE WITNESS: Sound recording performance
7 complement.

8 ARBITRATOR VON KANN: Thank you.

9 BY MS. LEARY:

10 Q And as to a featured artist in any three-
11 hour period, no more than four different selections of
12 sound recordings by the same featured artist from any
13 set or from any set of compilation of a single CD set;
14 is that correct?

15 A Without checking back at the statute, yes.

16 Q So if National Public Radio, for example,
17 wanted to do a comprehensive three-hour program on the
18 art of Dolly Parton, it could use more than four
19 selections under a 118 license, but it would be
20 prohibited from using more than four selections of any
21 compilation of Dolly Parton under the 114 license.

22 A I would have to go back and check the

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1 scope of the 118 license. And you're referring to
2 webcasting by a public radio station or broadcasting?

3 Q I'm referring in the first instance -- I'm
4 referring to both. If a program was made under the
5 118 license for broadcast, let me stipulate to you
6 that Section 118 contains no such sound performance
7 complement limitation. So if a program, a three-hour
8 program were made on the art of Dolly Parton and we
9 wished to use more than four selections from any sound
10 recording by Ms. Parton, we would be free to do so
11 under the Section 118 license. I will so stipulate
12 that to you. My question is could we do the same
13 thing under the terms and conditions of the 114
14 license for a webcast program?

15 A You certainly would be able to do it by
16 getting a license from the owners of the Dolly Parton
17 rights. If you're referring to the statutory license
18 --

19 Q Yes. My question is the statutory
20 license.

21 A -- the pure application of that would not
22 allow that, as it's presently written.

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1 Q So --

2 CHAIRMAN VAN LOON: And let me ask you,
3 please, Mr. Sherman, also to project to the back row.
4 Thank you.

5 BY MS. LEARY:

6 Q So, hypothetically, National Public Radio
7 could be in the position of making one program for
8 broadcast and having to make a separate program for
9 webcast with respect to the content from a single
10 featured artist; is that correct?

11 A Theoretically.

12 MS. LEARY: I have no further questions.

13 CHAIRMAN VAN LOON: Thank you. Are there
14 any other questioners from the webcaster/broadcaster
15 side services? No. Okay. Anything on redirect?

16 MR. GARRETT: Just one question, Your
17 Honor.

18 REDIRECT EXAMINATION

19 BY MR. GARRETT:

20 Q Mr. Sherman --

21 CHAIRMAN VAN LOON: Let me ask, also,
22 because the folks in the back are having difficulty

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1 hearing this.

2 BY MR. GARRETT:

3 Q Mr. Sherman, Mr. Rich, during his cross
4 examination, discussed with you the fact that record
5 companies attempt to secure air play on radio
6 stations. Do you recall that?

7 A Yes.

8 Q And you also discussed with him your
9 efforts, that is the record industry's efforts, to get
10 a performance right enacted into the copyright law.
11 Do you recall that?

12 A Yes.

13 Q Now, why is it that the record industry
14 would make such efforts to get a performance right if
15 at the same time they're also out there seeking air
16 play on radio stations?

17 A Because a basic tenet of copyright law,
18 and certainly something that the record companies all
19 believe, is that when somebody else uses your creative
20 property for their commercial benefit, the creator
21 should be compensated. It's a basic principle that
22 has application across every copyrighted work, even if

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1 the use of that copyrighted work might in some way
2 redound to the benefit of the copyright owner, such as
3 by the promotional value.

4 A good example is one that I gave earlier
5 where the making of a movie out of a book results in
6 a huge spike in sales of the book. Nonetheless, even
7 though there is therefore some promotional benefit,
8 it's still an exclusive right of the copyright owner,
9 and the motion picture studio pays for that right.

10 So there's nothing inconsistent with
11 attempting to be compensated for the commercial use of
12 your property and at the same time seeking to get the
13 promotional benefits out of use of the work, whether
14 on radio, TV or in any other way.

15 MR. GARRETT: I have no further questions.

16 CHAIRMAN VAN LOON: Anything further?

17 MR. RICH: Nothing further.

18 CHAIRMAN VAN LOON: Okay. And thank you
19 very much for being our lead-off witness on Day One.

20 THE WITNESS: My pleasure.

21 MR. SCHECHTER: Our next witness is going
22 to be Hillary Rosen.

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1 CHAIRMAN VAN LOON: Hold on one second,
2 please. We have a microphone mishap.

3 MR. SCHECHTER: Are we okay?

4 CHAIRMAN VAN LOON: Yes.

5 MR. SCHECHTER: We will be using two
6 powerpoints. They both come directly from her
7 testimony. So it's not an issue of --

8 CHAIRMAN VAN LOON: It's a redaction or --

9 MR. SCHECHTER: Yes.

10 CHAIRMAN VAN LOON: -- supplemental
11 diagram. It's two of the figures --

12 MR. SCHECHTER: Yes, thank you. Two of
13 the figures that are in the testimony.

14 CHAIRMAN VAN LOON: Perfect.

15 MS. ROSEN: Good morning, Mr. Chairman.

16 CHAIRMAN VAN LOON: Good afternoon.

17 MS. ROSEN: That's right.

18 ARBITRATOR VON KANN: Every time that
19 little exercise occurs, I'm reminded that when I was
20 sworn in as a judge I was so nervous that apparently
21 when the guy said, "Raise your right arm," I raised my
22 left arm.

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1 (Laughter.)

2 And I took the oath that way, and for ten
3 years never knew whether everything I did was subject
4 to reversal. But it has never been an issue, so I
5 hope got through it.

6 CHAIRMAN VAN LOON: I'm certain everything
7 you did was subject to reversal

8 (Laughter.)

9 ARBITRATOR VON KANN: But not for that
10 reason.

11 CHAIRMAN VAN LOON: You're probably right.
12 WHEREUPON,

13 HILLARY ROSEN
14 was called as a witness by Counsel for RIAA, having
15 first been duly sworn, assumed the witness stand, was
16 examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. SCHECHTER:

19 Q Ms. Rosen, could you please state your
20 name for the record and describe your professional
21 background for us?

22 A I'm Hillary Rosen, President and CEO of

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1 the Recording Industry Association of America. I have
2 been with the RIAA since 1987. Prior to that, I was
3 a Public Affairs Consultant with my own firm and with
4 some other firms in the Washington area.

5 Q In your work for RIAA, both as President
6 and CEO and before, were you involved in any
7 legislative activities on behalf of the recording
8 industry?

9 A I have been involved, since 1987, in
10 virtually every public policy issue affecting the
11 RIAA. And since 1996, when I was President, and 1998,
12 when I became CEO, I think it's fair to say that I
13 helped direct most of those activities.

14 Q Would that include the DPRA and the DMCA?

15 A That would very much include the DPRA and
16 the DMCA.

17 Q Okay. The first few pages of your
18 testimony describe the recording industry. And could
19 you just give us a brief summary of that testimony,
20 please?

21 A Yes. I think it might be useful, just in
22 the interest of time, I'll go through --

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1 Q Just tell us what's there.

2 A -- my testimony relatively quickly,
3 because it's available and you can read it. What we
4 tried to do, as I describe RIAA and sort of the shape
5 of the recording industry, is give you some background
6 about what we do and how the industry is shaped.

7 Essentially, record companies are members
8 of the RIAA. We have several hundred member labels.
9 There are five major record companies that,
10 themselves, consist of several individual labels.
11 And then those companies, in turn, will often
12 distribute sometimes 100 independent record labels.
13 RIAA doesn't have data on market share record
14 companies, but we did include some background data on
15 how the industry is structured. Then I went through
16 --

17 Q Is that -- excuse me for interrupting, but
18 that's Figure 1 on page 2?

19 A Yes, sorry, Figure 1 on page 2.

20 Q It's not one of the ones up here.

21 A Right. The Panel will be hearing from
22 several record company executives who can describe in

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1 greater detail the actual role of record companies and
2 what these businesses do. There are -- the
3 fundamental job of a record company is to bring an
4 artist's music to their fans and to find new audiences
5 for that music. At the RIAA, we play, principally, an
6 advocacy role for the business of the recording
7 industry, in the anti-piracy and marketing and in
8 public policy areas. And after the establishment of
9 the Digital Performance Rights Act and the DMCA, which
10 created the statutory license for some of those
11 performances, I go into how we created the Sound
12 Exchange on page 4 of my testimony.

13 Q Could you hold up just for a second?

14 A Yes.

15 Q Could you flip to Exhibit 103 DP. Could
16 you just briefly tell us what this document is?

17 A This is the letter that the Director of
18 the Sound Exchange, as well as the authorizing
19 documents that accompany the letter, send to a sound
20 recording copyright owner discussing and encouraging
21 their membership in the Sound Exchange.

22 Q Now you were present when Mr. Sherman

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1 described, in his testimony, the relationship between
2 the Sound Exchange and the RIAA Negotiating Committee;
3 is that correct?

4 A Yes.

5 Q Do you concur with that description so we
6 don't have to go over it again.

7 A Yes. Essentially, a right was
8 established, and it encouraged in the statute
9 marketplace negotiations with individual users.
10 Before Sound Exchange was formed, we created a
11 Negotiating Committee to undertake some of those
12 discussions. As the formation of Sound Exchange
13 became more specific, and in the future, Sound
14 Exchange will act as the specific agent for the member
15 copyright owners.

16 Q Turning now to the material that starts on
17 page 5, and put up the first slide, can you describe
18 for us in broad terms the U.S. market for sound
19 recording?

20 A Yes.

21 Q That's Figure 2 on page 6.

22 A For the last two years, as you can see,

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1 this is sales by volume. This is, essentially, the
2 price, consumer retail price.

3 Q Excuse me, that's sales by volume?

4 A Sales by value, sorry.

5 Q Value, yes.

6 A By dollars. Which is, essentially,
7 consumer retail price not adjusted for inflation or
8 population growth that -- it essentially shows that
9 for the last three years, sales have been in the \$14
10 billion range, and, unfortunately, have been
11 relatively flat for the last 18 months or so.

12 Figure 3 will show that those --
13 translates the dollar value into unit sales.

14 Q What is a unit in this context?

15 A A unit is either -- is any individual
16 music product -- a CD, a cassette, a DVD, audio. And
17 it shows, again, that unit sales, actually, last year
18 decreased, unfortunately, but over the last several
19 years have been relatively flat.

20 Q Could you briefly describe who shares, who
21 participates in the sales of the recording industry?

22 A In Figure 4 -- oh, there it is -- the

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1 participants in the sales of recorded music are
2 delineated. It's a long list of people who
3 participate in this product and therefore a long list
4 of people who deserve to get paid. Everything starts
5 with the artist who chooses a song from the music
6 publisher. That's a relationship described, I thought
7 well, by Mr. Sherman. Background vocalists,
8 background musicians, the record labels, the
9 producers, who are sometimes royalty participants on
10 their own. So many hit producers have their own
11 deals. Manufacturers, obviously, then distributors
12 and retailers. Interesting to note that all of those
13 participants, except retailers, still exist in the on-
14 line world. We're not getting rid of anybody.
15 Everybody still gets paid. And should I go on to --

16 Q Yes, please continue.

17 A The testimony then further outlines
18 essentially how this is a high-risk business and a
19 hit-driven business. Somewhere around five to eight
20 percent of new releases from record companies will
21 even make back their costs. Fewer than that will make
22 back profits. I don't think I have that number in

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1 there. That's sort of a constant anecdote that we've
2 always understood.

3 A way to measure that is that in the last
4 year there were something like -- there were 38,126
5 new releases sold.

6 Q Are you on page 11?

7 A I'm on page 11. And of those 38,000
8 albums, only 523 even sold more than 100,000 units.
9 The words, "gold" and "platinum" records are popular
10 terms. A gold record is 500,000 units, so the number
11 that reached gold is significantly fewer than that.
12 That's important to know, because it's obviously the
13 hits that pay for the investment in all of the rest of
14 the music, which I think probably gets me closer to
15 the conclusion of my direct testimony, which is about
16 how important new revenue streams are.

17 And one of the reasons that the music
18 community came together to pursue a public performance
19 right is that with so many new distribution streams it
20 was important to find ways to be able to regain
21 investment in money. So it wasn't that everything
22 could drive, actually, the sale in retail stores; it

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1 was so that you didn't have to depend on retail stores
2 to make back investments in artists. It allowed you
3 to invest in a broader group of artists. The motion
4 picture industry is sort of a good example of this.
5 They exploit their copyrighted work, they release it
6 theatrically. Then they sell it to television, they
7 sell it to cable and satellite transmitters, they
8 release the videocassette.

9 The Congress, in 1995, saw those as
10 technology issues, I think, for the recording industry
11 and thought that there were ways that we could then
12 have to develop alternative revenue sources. But it
13 only happens, really, if those new businesses that get
14 created from using music share in the risks that are
15 made in investing in that music.

16 Generally -- I heard somebody say
17 yesterday, I don't remember who it was, that we don't
18 want these businesses to succeed. We only succeed if
19 they succeed. So there is every incentive for the
20 music community to have new distribution
21 opportunities, new businesses be created, because
22 those revenue sources are going to be critical to our

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1 ability to assess investment in artists over time.

2 So, finally, that's why it is clear to me
3 that the deals we've negotiated in the marketplace
4 with that attitude at the table from both parties
5 really result in the excellent way for this Panel to
6 determine the willing buyer and willing seller
7 analysis. I'd be happy to answer more questions.

8 MR. SCHECHTER: I think, unless the Panel
9 has any questions, we're done.

10 CHAIRMAN VAN LOON: Not at this time.

11 CROSS EXAMINATION

12 BY MR. STEINTHAL:

13 Q Good afternoon, Mr. Rosen. In your
14 testimony, you say that the RIAA is designated as a
15 common agent to negotiate the rates and terms for its
16 members, correct.

17 A Yes.

18 Q And they do so on behalf of 85 percent of
19 the label industry, correct?

20 A Well, the terms that are negotiated are
21 those that sign up to have the RIAA be its agent, but
22 I think that number's about right. Now it's closer to

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1 90 percent, I think.

2 Q Okay.

3 ARBITRATOR VON KANN: Keep your voice up,
4 if you can.

5 THE WITNESS: Sorry. Now we think it's
6 closer to 90 percent.

7 BY MR. STEINTHAL:

8 Q And I do my math right, based on the pie
9 chart from the other sources in your testimony, the
10 five majors alone account for about 85 percent of the
11 market share?

12 A Yes.

13 Q Now, I believe in your testimony you say
14 the members granted the RIAA the rights to negotiate
15 collectively on a non-exclusive basis, right?

16 A Yes.

17 Q Are you aware, in fact, of any licenses
18 that have been issued by any of the RIAA member
19 companies whereby they, rather than the RIAA, have
20 granted to a user rights covering only the rights to
21 make the uses permitted by Section 112 and 114?

22 A No. I don't know.

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1 Q Well, as a practical matter then --

2 A But I might not know also.

3 Q You don't know of any; that's fair to say.

4 A Yes, right.

5 Q To your knowledge, would it be fair to say
6 that the RIAA has essentially functioned de facto as
7 an exclusive agent for the licensing of the rights
8 under Sections 112 and 114?

9 A No.

10 Q Do you know of any situation where anyone
11 other than the RIAA has issued a license to a
12 webcaster or a broadcaster to make the performances
13 and reproductions authorized under Sections 112 and
14 114 of the Copyright Act.

15 A I also don't know of any webcaster that's
16 ever sought such a license from a record company.

17 Q But the answer is then, as of today, the
18 only licenses you're aware of under Sections 112 and
19 114 of the Copyright Act are licenses that have been
20 issued by the RIAA, correct?

21 A Yes.

22 Q And you heard yesterday Mr. Garrett talk

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1 about various licenses issued by the labels directly
2 for streaming videos, for streaming clips, for locker
3 and playback services, for subscription-on-demand
4 services and interactive streaming services, correct?

5 A Yes.

6 Q And those are for rights outside the uses
7 permitted by Sections 112 and 114, correct?

8 A Yes.

9 Q And for those types of licenses, the RIAA
10 can't act on the collective behalf of the labels,
11 correct?

12 A Right.

13 Q And that's because the anti-trust laws
14 don't permit the RIAA to act in that fashion, right?

15 A Well, I'm not sure I'd want to act in that
16 fashion even if they did permit it, but I think so.

17 Q Well, you're familiar with the fact, of
18 course, the RIAA has an anti-trust exemption that's
19 limited to the rights under Sections 112 and 114,
20 right?

21 A Yes.

22 Q Now, the Justice Department opposed --

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1 A Sorry, it's not -- the exemption doesn't
2 extend to the RIAA; I think it extends to a collection
3 of copyright owners.

4 Q And the RIAA was designated by those
5 copyright owners, correct?

6 A Right.

7 Q Now, the Justice Department opposed giving
8 the copyright owners an exemption for Sections 112 and
9 114, did it not?

10 A I think that it did.

11 Q But the RIAA specifically fought against
12 the Justice Department on that issue in Congress and
13 ultimately prevailed in getting an exemption for
14 purposes of collective negotiations of licenses under
15 Section 112 and 114, right?

16 A That's not how I recall, Mr. Steinthal.

17 Q Well, is it true or not true that the RIAA
18 lobbied in favor of having that exemption?

19 A It's not true, actually. We didn't really
20 -- this compulsory license was essentially a
21 collaborative effort between the webcasters and the
22 RIAA. We didn't seek it from the Congress. There was

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1 a determination that they wanted an easy way to
2 license, and we said that we were not going to be in
3 a position to provide that easy way to license under
4 the existing anti-trust rules. It was Congress and
5 the Commerce and Judiciary Committees that decided
6 that they wanted to give the webcasters a collective
7 way to license these. And so it was Congress that
8 fought with the Justice Department for this anti-trust
9 exemption, not us.

10 Q So it's your testimony the RIAA did not
11 favor the exemption.

12 A I think it -- it's my recollection that we
13 said, "If you expect us to perform this activity, then
14 we need it."

15 Q Who's the us, the labels?

16 A The industry as a whole, yes. Because
17 remember the webcasters were going to say, "Well,
18 these transaction costs" -- they wanted this
19 collective action.

20 Q Let me get this straight. When it became
21 clear there was going to be a compulsory license under
22 112 and 114 --

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1 A Right.

2 Q -- did the RIAA favor or not favor an
3 exemption under the anti-trust laws?

4 A We did favor it, but I was just suggesting
5 that the way you characterized it was not accurate.

6 Q Ms. Rosen, is there a process whereby the
7 RIAA goes about securing the 25, now 26, webcasting
8 licenses that have been relied upon by the RIAA in
9 this case?

10 A My understanding from my staff is that
11 most of the people who are licensed actually
12 approached us and sought licenses.

13 Q Well, who at the RIAA is responsible for
14 negotiating and drafting the licenses?

15 A Steven Marks.

16 Q What's your role?

17 A I don't really have one.

18 Q Have you been involved in the negotiation
19 of any of the 26 licenses of webcasters that have been
20 talked about?

21 A I was involved in the deal with Yahoo.

22 Q What was your involvement in the Yahoo

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1 deal?

2 A I had met Jerry Lang -- Jerry Yang, the
3 Co-Founder of Yahoo through some mutual friends. And
4 we developed a good relationship, talked about a
5 series of issues. He said that he wanted to have a
6 statutory license. They had recently bought
7 Broadcast.com. And I relayed his views to Mr. Marks,
8 and we began to work collaboratively with Yahoo to try
9 and reach an agreement.

10 Q Other than your initial conversation of
11 that order with Mr. Wang --

12 A Yang.

13 Q -- Yang, did you have further discussions
14 and participation in the negotiation of that license?

15 A Yes. I think I had several conversations
16 with Jerry over the course of a couple-of-month
17 period.

18 Q I'm going to come back to that at a time
19 when we have a private rather than public courtroom if
20 we're going to talk about the terms of that deal to
21 avoid problems on that.

22 Other than the Yahoo deal, have you been

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1 involved in any other of the negotiations leading up
2 with the 26 licenses that the RIAA has entered into
3 with webcasters?

4 A Not of the other licensees, no.

5 Q Now, you mentioned Mr. Marks -- and,
6 again, many of us without the benefit of discovery are
7 operating in a somewhat of a vacuum about how these
8 deals come about. So I'm going to ask you
9 uncharacteristically on cross some very open-ended
10 questions so we can all find out a little bit more
11 about the way this process works.

12 You say Mr. Marks is involved in the
13 negotiations. Were there other people on the staff of
14 the RIAA that are involved in the negotiation and
15 drafting of licenses to webcasters?

16 A Mr. Marks has a staff of two people that
17 help him draft and negotiate with licensees, and I
18 think he consults regularly with Mr. Sherman.

19 Q Who are the two people on his staff that
20 you're referring to?

21 A Gary Greenstein and Susan Munsat.

22 Q And Mr. Greenstein formerly of Arnold &

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1 Porter, the outside counsel to RIAA?

2 A We only hire Arnold & Porter.

3 (Laughter.)

4 MR. GARRETT: She said that under oath.

5 (Laughter.)

6 MR. STEINTHAL: So I guess you're safe for
7 another day.

8 BY MR. STEINTHAL:

9 Q With respect to who has the burden or
10 responsibility for literally negotiating the terms of
11 the webcaster deals, is it Mr. Marks?

12 A I think it is, yes.

13 Q Now, is there some oversight or reporting
14 role that occurs as between Mr. Marks, on the one
15 hand, and Mr. Sherman or you within the RIAA and the
16 RIAA Negotiating Committee, which you refer to in your
17 testimony?

18 A Well, Mr. Marks reports regularly and
19 discusses the issues regularly with the Negotiating
20 Committee -- record executives with a lot of
21 experience in these kinds of areas -- but I think he
22 also regularly consults with Mr. Sherman, not with me.

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1 Q Let's talk about the Negotiating
2 Committee. Who's on it?

3 A You mean names?

4 Q Yes.

5 A I'm not sure I have all the names.

6 Q Well, maybe you can do it -- are there
7 seats on the Committee by label?

8 A What the Committee has been the Senior
9 Business Affairs Executive or their designee from each
10 of the majors. We reached out to the independent
11 association, AFIM, who had a designee on the
12 Committee. And Mr. Marks consults regularly with a
13 couple of other independent companies.

14 Q Who are or are not on the Committee?

15 A I don't think there's another formal role
16 for them but who he just talks to.

17 Q So are there -- do I understand correctly
18 then there are --

19 A But who have designated Sound Exchange and
20 RIAA to be their agent.

21 Q Okay. I'm confused a little bit between
22 the Negotiating Committee and Sound Exchange as a

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1 body, so let's focus on the Negotiating Committee for
2 a minute. You mentioned that the five majors each
3 have a role. Is it, essentially, a seat that they
4 fill with one person or if that person can't fill it,
5 then they designate somebody else? Is that the way it
6 works?

7 A Yes.

8 Q Would it be fair to say that the primary
9 designee that's participated for each of the five
10 majors are as follows: From Universal, Mr. Kenswil?

11 A I don't know.

12 Q If it's not he, do you know who it would
13 be?

14 A It would be Michael Ostroff or David Ring
15 maybe.

16 Q And from Sony Music is it Mr. Wilcox?

17 A I think so. He's the head of Business
18 Affairs. Are you saying if not these people, then
19 their designee?

20 Q Yes.

21 A Okay.

22 Q I'm trying to find out who the principal

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1 people are that have participated on behalf of the
2 major labels on the Negotiating Committee. And if,
3 occasionally, they designate somebody else, and you
4 know the name of that person, it would be helpful to
5 know who it is. So we've done Universal. On Sony,
6 it's Mr. Wilcox?

7 A I believe it is.

8 Q Okay. Do you know any designees of him
9 that have participated in his stead from time to time?

10 A I can't remember. I think he's -- if he's
11 not a witness, you can ask Mr. Marks.

12 Q Okay. And from BMG is it Ms. Evans?

13 A I believe it is.

14 Q And from EMI is it Jay Samit?

15 A I think it's Alister McMullan.

16 Q Okay.

17 A But Mr. Marks will be a better source on
18 this than I am.

19 Q Well, I'd like to get some information --

20 A Okay.

21 Q -- in the weeks before we get to him so
22 that we can be a little bit more prepared, I'm afraid.

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1 A Okay.

2 Q And what major am I missing without trying
3 to insult them? Warner. Is that Mr. Vidich?

4 A Either Mr. Vidich or Paul Robinson.

5 Q And what is the role of the Negotiating
6 Committee relative to Mr. Marks in the process whereby
7 deals are negotiated and approved?

8 A He reports to them. They approve the
9 deals.

10 Q Do they meet on a regular basis or on a
11 transaction-oriented basis or how often?

12 A I believe they've had regular conference
13 calls, either every other week or every week, as
14 necessary.

15 Q Going back to when?

16 A Sometime after the DMCA passed, but I
17 don't know the exact date; I'm sorry.

18 Q And what's the charter of the Negotiating
19 Committee. I don't mean a piece of paper. What's the
20 scope of activities that the Negotiating Committee is
21 concerned with?

22 A Well, it's very limited, obviously, to

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1 giving Steve guidance on the approval of deals under
2 the statutory license.

3 Q And that's it?

4 A Yes.

5 Q Now, does the RIAA do any research with
6 respect to how prospective licensees, under 112 and
7 114, actually use sound recording?

8 A We have a staff of Internet specialists
9 that are regularly monitoring the web for a host of
10 things. And I think that Steve and his staff consult
11 with them to evaluate various services at any given
12 time.

13 Q Is one of the reasons because, as a
14 practical matter, you have to determine whether a
15 given prospective licensee is eligible for the Section
16 112 and 114 compulsory license?

17 A I suppose so.

18 Q Because, of course, you're not permitted
19 to negotiate with those prospective licensees unless
20 they fall within 112 and 114, right?

21 A Right.

22 Q Have there been occasions where the RIAA,

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1 in doing its research about certain webcasters, has
2 determined that in its view the webcaster's use of
3 sound recordings or its contemplated use of sound
4 recordings falls outside the eligibility requirements
5 for the statutory license?

6 A Yes.

7 Q And would that include situations where
8 the RIAA deems the activity of a given webcaster to be
9 interactive?

10 A Yes.

11 Q Now, in that event, is it correct that
12 unless the webcaster has voluntary licenses with each
13 individual label whose titles it is using, your view
14 is they'd be infringing?

15 A Yes.

16 Q And, of course, if the RIAA felt the user
17 fell outside the protections of Sections 112 and 114,
18 the RIAA itself wouldn't be permitted to negotiate
19 collectively for its members, correct?

20 A For that service you mean?

21 Q Yes.

22 A Yes -- no.

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1 Q Now, isn't the fact, however, that the
2 RIAA, in certain situations, has warned companies that
3 unless they ceased and desisted from making uses that
4 the RIAA believed to be interactive and therefore
5 outside the statute, that those companies would be
6 sued for infringement?

7 A I'm actually not sure -- you mean as in a
8 formal C&D letter?

9 Q In a formal C&D letter or a verbal -- I'm
10 asking whether there have been situations where the
11 RIAA has told webcasters to cease and desist or else
12 they're going to get sued for infringement?

13 A Yes. We have two issues here. One is the
14 RIAA acts as the anti-piracy organization for the
15 industry. And also, in this regard, I have felt, as
16 a policy matter, particularly protective of licensees
17 that had licenses, because, frankly, more of the
18 complaints about things like interactivity came from
19 the licensees, the legitimately licensed webcasters,
20 than from the record company sometimes.

21 Q So it's your testimony that it's the
22 licensees that are more concerned about the activities

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1 of Launch or MTV or Music Match than the RIAA?

2 A As concerned, yes. Absolutely.

3 Q Are you aware of any documents that were
4 produced in response to our request in this case that
5 indicated any webcaster had a problem with those
6 services?

7 A No.

8 Q So if I understand this correctly, even
9 though the RIAA cannot negotiate for licenses outside
10 of Section 112 and 114, including specifically if it
11 determines that a webcaster is interactive, the RIAA
12 has seen fit to send cease and desist letters or
13 notices or warnings to certain webcasters that unless
14 they do something differently they could be sued for
15 infringement, correct?

16 A I think we've only actually threatened to
17 sue in one case. And in that case, we actually did
18 sue. I think in other cases they were more informal
19 warnings, but I don't think we've ever threatened to
20 sue somebody that we didn't sue.

21 Q Well, a threat is a threat is a threat,
22 whether or not you follow up on suing, is it not?

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1 A No. We don't take threats lightly since
2 we actually do a lot of litigation. We're very
3 careful about who we threaten.

4 Q And indeed you threatened, and you
5 threatened Launch and you threatened Music Match, and
6 you sued all three, right?

7 A No.

8 Q I'm sorry, the label sued all three after
9 you threatened them.

10 A No. We sued Launch. After we asked them
11 to take it down and they didn't, we sued them. But we
12 didn't threaten MTV, and what was the other one you
13 said?

14 Q Music Match.

15 A Right. We didn't threaten them. We,
16 actually -- they, actually, I guess, anticipated
17 something and filed suit against us.

18 MR. GARRETT: Let the Witness finish.

19 BY MR. STEINTHAL:

20 Q Didn't you call Judy McGraff the night
21 before MTV got sued to tell her that MTV was going to
22 get sued?

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1 A That was after they sued us.

2 Q In a declaratory judgment, right?

3 A Yes.

4 Q Okay.

5 A But unsolicited.

6 Q Well, let's say it. I'm glad you said
7 unsolicited. Are you familiar with a motion that was
8 filed by the RIAA in this case on May 25 where it
9 sought to dismiss the applications of seven services
10 from participating in this CARP?

11 A Yes.

12 Q Was MTV and Launch and Music Match all
13 named in that motion?

14 A Yes, but there was no threat to sue them
15 in that motion.

16 Q What would the effect have been, Ms.
17 Rosen, if they were knocked out of this CARP?

18 A Well, as I understand it, they were
19 participants in this CARP for the statutory deal, but
20 that there were legitimate disagreements about their
21 interactive services, and that these companies wanted
22 this Panel to make a decision about how to assess

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1 rates for their interactive services, while at the
2 same time most of these companies were in negotiations
3 with record companies themselves for individual deals
4 for those interactive services. So we didn't think it
5 was appropriate to have that be a CARP issue. That
6 wasn't a threat against those companies. That was
7 just a decision about how do we limit what's in the
8 statutory license and what isn't?

9 Q But those companies that actually filed
10 direct cases indicating that they feel that they're
11 eligible for this statutory rate setting, even as to
12 the services that you call interactive but they
13 believe are not interactive under the statute; isn't
14 that right?

15 A I'm not disparaging their motives; I'm
16 just telling you our view.

17 Q But you know, do you not, that they take
18 the position that their services are not interactive?

19 A I know that they take that position, and
20 we take a different view.

21 ARBITRATOR VON KANN: Let me make sure.
22 The motion that you have just been asked about was to

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1 exclude them because in RIAA's view, they were
2 engaging in interactive services that did not qualify
3 for this compulsory license?

4 THE WITNESS: Not to exclude them, just to
5 exclude that portion, licensing that portion of their
6 services that we thought are interactive.

7 ARBITRATOR VON KANN: Would there have
8 been other activities that they were engaged in that
9 you thought did qualify, and therefore didn't have to
10 be excluded from this proceeding? I haven't read the
11 motion so I don't know precisely how it was framed,
12 but were you asking that these entities disappear
13 entirely or that portions of their activities could
14 remain subject to the CARP and other portions not?

15 THE WITNESS: Right. It is a good
16 question and I am probably not going to be very
17 articulate answering it. Mr. Griffith, I think, is
18 going to do a demonstration.

19 MR. SCHECHTER: If Your Honor, if I may,
20 I think our papers would speak for themselves on that.
21 I believe I am accurately representing them to say
22 that it was only that portions were in and portions

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1 were out.

2 ARBITRATOR VON KANN: Okay. Well I'll go
3 back and look.

4 THE WITNESS: Essentially you have a
5 series of streams, and then different companies set up
6 what they call features on their site to try and
7 attract more listeners and more viewers. Those
8 different features allow the consumer to do different
9 things to make it cool.

10 So you know, MTV, for instance, has a
11 button that says pick your favorite artists. Or, I
12 like that artist, I want to hear more of that artist.
13 So the general view that we have taken is those extra
14 features create a personalized service that are
15 therefore then outside the statutory license. That is
16 what we tried to make a distinction between in our
17 brief.

18 ARBITRATOR VON KANN: Thank you.

19 BY MR. STEINTHAL:

20 Q While on that very subject, of course just
21 to be clear for the Panel, they don't provide music on
22 demand, do they?

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1 A I don't know how to answer that.

2 Q Well, I mean as you know, they have
3 features whereby you can tell the operator or the
4 service who your favorite artists are, but you can't
5 ask for that given song or a given artist and get it
6 right away, can you?

7 A Right. I have long had this question
8 about whether they were fooling us or fooling their
9 consumer because I couldn't figure --

10 Q That is because you think they are giving
11 the impression that they are more interactive than
12 they are?

13 A Yes.

14 Q Okay.

15 A I never really understand which way to
16 listen to that argument.

17 Q Well, they will be testifying as to just
18 how interactive they are later in the proceeding.

19 Let's go back to Music Match. Music Match
20 is one of the companies that you filed your motion
21 against because you felt it was interactive, right?

22 A Yes.

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1 Q Okay.

2 A (No response.)

3 ARBITRATOR VON KANN: Could I have
4 somebody just state for me what the seven companies
5 are?

6 MR. STEINTHAL: I would be happy to do
7 that, Your Honor.

8 ARBITRATOR VON KANN: I just heard Music
9 Match.

10 MR. STEINTHAL: Music Match, MTV, which
11 has a service called Radio Sonic Net that is just
12 operated by MTV, Launch Media, Echo Networks,
13 Listen.com, Encanta, and Exact Radio. I think I got
14 seven there. Encanta has since withdrawn from the
15 CARP. The other six are still in the CARP.

16 ARBITRATOR VON KANN: Thank you.

17 BY MR. STEINTHAL:

18 Q What features of Music Match did you find
19 problematic that led to the motion to exclude their
20 service? On that case, it was their entire service,
21 was it not?

22 A You are above my pay grade on this one,

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1 Mr. Steinthal, sorry.

2 MR. SCHECHTER: The papers will speak for
3 themselves on this issue.

4 BY MR. STEINTHAL:

5 Q Are you familiar with what features
6 generally Music Match had that motivated the RIAA to
7 make that motion?

8 A No.

9 Q Are you familiar with the fact that on
10 Music Match you can type in up to 25 artists that you
11 prefer, that you like, that you want to hear, and then
12 they will slot you into a station?

13 A No.

14 Q You never heard that?

15 A I don't -- I'm sorry I don't know.

16 MR. STEINTHAL: Do you want me to quote
17 the press release where she was talking about the
18 settlement with Music Match.

19 MR. SCHECHTER: I am curious what this has
20 to do --

21 THE WITNESS: I can tell you about the
22 settlement.

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1 MR. SCHECHTER: Excuse me. There is an
2 objection I would like to make. That is, that cross
3 examination is supposed to be limited to the direct.
4 None of this was the subject of Ms. Rosen's direct
5 testimony.

6 MR. STEINTHAL: Excuse me. I believe she
7 is relying on her direct testimony on the deals done
8 by the RIAA as the best benchmark for setting a fee
9 here.

10 MR. SCHECHTER: You have objected to the
11 inclusion of the Music Match deal in this proceeding.
12 It is not in the record at the present time.

13 MR. STEINTHAL: I believe the chart that
14 you were shown yesterday, Your Honors, by the RIAA,
15 had 26, not 25 companies on it. Mr. Garrett referred
16 to that. The last entity on it was Music Match.
17 Everything I am cross examining about relates to the
18 very issue of motivations to enter into licenses with
19 the RIAA, going directly to the licenses that have
20 been charted by the RIAA as being directly relevant to
21 the setting of a fee here.

22 MR. SCHECHTER: I would say two things on

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1 that. Mr. Garrett did identify that that was not in
2 the record yet but we hope that the motion will be
3 granted and it will be included in the record. I
4 would also object on the grounds that we have got the
5 wrong witness here.

6 ARBITRATOR GULIN: Mr. Steinthal, I
7 understand these are issues, but what is it in the
8 direct testimony of this witness that you are cross
9 examining specifically?

10 MR. STEINTHAL: Okay, the very conclusion.

11 CHAIRMAN VAN LOON: Which page in the
12 direct testimony?

13 MR. STEINTHAL: Thirteen. There is
14 another reference earlier on page one, where the
15 witness refers to the best benchmarks for this panel
16 being real world negotiations that have led to the
17 various transactions entered into between the RIAA and
18 webcasters for the setting of a fee. It is both on
19 the first page and the last page, where the last
20 sentence, we urge that you adopt rates and terms for
21 webcaster statutory licensees that are consistent with
22 the rates and terms that we have in fact negotiated.

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1 MR. SCHECHTER: I would note the members
2 of the negotiating committee and the chief negotiator
3 will be testifying in this proceeding. She has
4 already stated she has no knowledge, no involvement,
5 no involvement in these deals beyond that.

6 CHAIRMAN VAN LOON: We are going to
7 withdraw and discuss this hopefully briefly. We will
8 return shortly.

9 (Whereupon, at 2:25 p.m., the proceedings
10 went off the record, and went back on the record at
11 2:30 p.m.)

12 CHAIRMAN VAN LOON: The Panel has
13 determined unanimously that we will continue to allow
14 this scope and direction of questioning. The basis
15 for this is that we have been told repeatedly in the
16 testimony and in the opening statements yesterday how
17 critical these 25 or 26 agreements are, what a central
18 role they should have, what a benchmark they are.
19 This testimony does refer in both in the beginning and
20 the end to the importance of these benchmarks. It
21 does say in the immediate sentence that the focus, in
22 the immediate following sentence, that the focus of

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1 this particular testimony will be background of the
2 industry, but it is involved here. Of course we will
3 hope to hear much more and much greater detail from a
4 later witness.

5 BY MR. STEINTHAL:

6 Q All right. Ms. Rosen, it's correct, is it
7 not, that Music Match was sued by various record
8 companies after the May 25th motion to exclude their
9 consumer influence service from this proceeding,
10 correct?

11 A Yes.

12 Q Even though as you testified that the RIAA
13 believed that Music Match was interactive, is it not
14 correct that the RIAA proceeded to negotiate on behalf
15 of the collective members of the RIAA with Music Match
16 after that?

17 A I think that we began to negotiate with
18 them to settle the lawsuit.

19 Q The RIAA was negotiating with them to
20 settle the lawsuit?

21 A I am not actually sure of the specifics.

22 Q But you know that the RIAA was

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1 negotiating.

2 A I honestly don't know the process of what
3 happened at the time.

4 Q Let's work backwards then.

5 A Who did what, when.

6 Q Let's work backwards. An agreement was
7 ultimately negotiated between the RIAA and Music Match
8 for a license under Section 112 and 114 of the
9 Copyright Act, right?

10 A That's right.

11 Q So at some point, the RIAA made a
12 determination that a service that had previously been
13 treated by the RIAA as interactive would be a service
14 that they would license under Section 112 and 114,
15 right?

16 A Right. But I do know two things. One is
17 that they changed their service before they were
18 licensed under the statutory license. Two, that there
19 was another company, Listen.com, that didn't want a
20 statutory license that the lawsuit was settled without
21 negotiating a statutory license. It was just settled
22 on the interactive side.

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1 Q Let's move aside Listen. We will come
2 back to them. Let's focus on Music Match here.

3 A Okay.

4 Q Your testimony is that the RIAA considered
5 them interactive. A lawsuit was brought against them
6 for infringement because they were deemed by you to be
7 interactive.

8 A Yes.

9 Q Not sure how the negotiations were
10 conducted. In the end, there is a settlement
11 agreement. Music Match gets a license, treating it as
12 performing sound recordings under 112 and 114, but
13 under circumstances where it agrees to change its
14 service somewhat. Correct?

15 A That is my understanding.

16 Q Okay. Are you familiar with the fact that
17 as part of that whole process Music Match made a
18 number of concessions to the RIAA in order to be
19 treated as a statutory licensee and in order to obtain
20 a release of the infringement claims?

21 A I am sorry. I am really not familiar with
22 how the details of the process went.

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1 Q But you know that some concessions were
2 made, including with respect to the service?

3 A That is my understanding, yes.

4 Q Are you familiar with the fact that even
5 today after the settlement agreement, you can put 25
6 artists in as your preferred artists, get to a
7 station?

8 A No. I am not familiar with how their
9 service works.

10 ARBITRATOR VON KANN: Can I get a little
11 clarification? I want to make sure I am following
12 this. We talked a few minutes ago about the motion
13 that RIAA made in this proceeding with respect to
14 seven services, one of which was Music Match
15 apparently. As I understood the thrust of that motion
16 was to exclude from our consideration the portion of
17 those companies' services that you deemed, you thought
18 were interactive.

19 Now apart from that motion, I am
20 understanding that a lawsuit was filed, I suppose in
21 Federal District Court somewhere. Right? Do you
22 happen to know where?

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1 THE WITNESS: California.

2 MR. STEINTHAL: New York.

3 MR. SCHECHTER: Your Honor, there are a
4 couple of lawsuits filed. As I said, we can present
5 other witnesses.

6 ARBITRATOR VON KANN: Okay. I understand
7 this witness may not have the most knowledge about it
8 and so others will come.

9 Was that, to your knowledge, with respect
10 again to these same seven companies or was it a
11 different --

12 THE WITNESS: The lawsuit?

13 ARBITRATOR VON KANN: The lawsuit or
14 lawsuits multiple. Or are we still dealing with the
15 same seven or is it a different cast of characters?

16 THE WITNESS: I don't know if all seven
17 were targets of the lawsuit that was filed in response
18 to the declaratory.

19 ARBITRATOR VON KANN: Let me see if I get
20 the sequence. RIAA filed a motion.

21 THE WITNESS: We filed a suit against one.
22 We filed a motion.

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1 ARBITRATOR VON KANN: Then some of those
2 seven responded by seeking a declaratory judgement in
3 court that they I guess were not interactive, and
4 therefore could participate in the CARP?

5 THE WITNESS: Right.

6 ARBITRATOR VON KANN: Could have their
7 statutory license, I suppose.

8 THE WITNESS: Right.

9 MR. STEINTHAL: One intervening fact which
10 is the day before the motion was filed, one of the
11 webcasters, Launch, was sued for infringement.

12 ARBITRATOR VON KANN: Okay. Then in
13 response to the declaratory judgement in some
14 instances, RIAA I suppose counter claimed that these
15 folks were infringing?

16 THE WITNESS: We sued Launch in New York.
17 These guys all filed a lawsuit against us in
18 California. We said we already have this case in New
19 York. As I recall, it was let's get all these cases
20 together before the judge in New York. At the same
21 time, the Copyright Office had a petition for a ruling
22 which I understand has sort of split the baby. It

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1 says that the Panel can hear testimony on the
2 interactive issue, maybe look at the rates, but that
3 a definition of what should be interactive remains a
4 subject of the court's jurisdiction.

5 ARBITRATOR VON KANN: Was all this frenzy
6 of activity in the last couple of months or a year ago
7 or how long ago are we talking?

8 MR. STEINTHAL: All of this since May
9 24th.

10 ARBITRATOR VON KANN: All this since May
11 24th of this year?

12 THE WITNESS: Yes.

13 MR. GARRETT: We really had nothing else
14 to do.

15 (Laughter.)

16 ARBITRATOR VON KANN: Okay. All right.
17 I am getting a little background. Thank you.

18 BY MR. STEINTHAL:

19 Q Ms. Rosen, are you familiar with the fact
20 that Music Match rejected paying the very license fee
21 it ultimately agreed to pay the RIAA during
22 negotiations that occurred months before they were

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1 sued for infringement?

2 A (No response.)

3 MR. SCHECHTER: Can I raise an objection?
4 This is really a point of clarification. Are we
5 treating as fair game all settlement negotiations that
6 failed to produce agreements? I mean these are an
7 earlier series of negotiations. Normally settlement
8 negotiations are protected by rule 408. I am curious
9 as to whether we are going to apply that approach here
10 just so we know and the other side knows whether all
11 of the negotiations that took place that didn't result
12 in agreements is fair game.

13 MR. STEINTHAL: I would answer that by
14 saying that if it ultimately results in an agreement
15 that they are trying to rely upon to set a fee in this
16 case, everything is fair game on cross examination as
17 to what happened leading up to that agreement.

18 ARBITRATOR VON KANN: Don't you have -- I
19 mean it is true that typically an agreement that
20 results from settlement discussions concerning a
21 lawsuit, the agreement is evidence in whatever it
22 says, but the settlement negotiations are typically

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1 not admissible. But if one party wants to hold that
2 up as an example of the free marketplace at work, it
3 seems to me the other side is entitled to probe a bit
4 as to whether that is what it really reflects or
5 whether there were lots of other considerations going
6 on.

7 MR. SCHECHTER: The issue may arise in
8 another context.

9 BY MR. STEINTHAL:

10 Q Do you remember the question or should I
11 try it again?

12 A Give it to me again.

13 Q Okay. The question was whether you are
14 familiar with the fact that Music Match had rejected
15 paying as high a fee as it ultimately agreed to pay
16 after it was sued for infringement during negotiations
17 that occurred months before it was sued for
18 infringement?

19 A No. Actually I don't --

20 Q You don't know it one way or the other?

21 A I don't know that I knew that we had
22 talked to them before about a fee.

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1 Q Okay. By the way, Ms. Rosen, do you know
2 how many of the other 2,200-plus companies that
3 applied for a license under Section 114 of the
4 Copyright law have entered into agreements with the
5 RIAA -- strike that. Let me rephrase that.

6 Do you know how many of the other 2,200-
7 plus licensees that have or perspective licensees that
8 have filed notices of intent to avail themselves of
9 the license operate services that the RIAA believes at
10 any given point in time were interactive?

11 A No.

12 Q Do you know whether -- where's the list of
13 the 25 of our chart? While they are bringing up the
14 chart just to remind you who the 25 prior licensees to
15 Music Match were. Do you know whether any of the
16 other 25 licensees that actually entered into
17 agreements with the RIAA have features that the RIAA
18 considers or has considered to be potentially
19 interactive?

20 A Well, I do know that if they have
21 interactive features, we would not have -- we are not
22 licensing those interactive features to date, and that

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1 we would not have licensed them at the time.

2 Q Well, you considered Music Match
3 interactive at one point, and then ultimately reached
4 an agreement with them when they determined --

5 A But Music Match changed their service.

6 Q Are you familiar with the fact that the
7 RIAA has had discussions with other licensees of the
8 25 companies that entered into licenses, specifically
9 on the subject of their conforming their service to
10 certain parameters, otherwise the RIAA wouldn't
11 license them?

12 A No.

13 MR. SCHECHTER: Are you talking about our
14 licensees?

15 BY MR. STEINTHAL:

16 Q Yes. Your 25 licensees. These 25. Do
17 you know of any others where --

18 A (No response.)

19 CHAIRMAN VAN LOON: Are you able to see
20 those or does this table block your view?

21 THE WITNESS: I don't think it matters
22 because I am not aware of it, but it seems perfectly

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1 appropriate to me that RIAA would be educating
2 webcasters about the rules under which they are
3 qualifying for a statutory license. That seems to me
4 not only an appropriate discussion, but a necessary
5 one.

6 BY MR. STEINTHAL:

7 Q Therefore, you think it is just fine for
8 the RIAA to say look, we think your service today is
9 interactive. If you launch it or you continue to
10 operate it in this fashion, we will have you sued for
11 infringement. But if you change your service a little
12 bit, we will deem you to be within section 112 and 114
13 and we'll issue you a license at X dollars. That's
14 okay?

15 A That is a threat I am certain we never
16 made.

17 Q You don't think you made it to Music
18 Match?

19 A No.

20 ARBITRATOR VON KANN: Let me make sure I
21 understand your position about that. I think what I
22 hear you saying, correct me if I am wrong, is in your

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1 view I guess, RIAA would not be entitled to enter into
2 an agreement under this provision with respect to a
3 service that was interactive?

4 THE WITNESS: Right.

5 ARBITRATOR VON KANN: Therefore, in order
6 to as a prelude to having any negotiation, you have to
7 be satisfied that the agreement would be lawful, that
8 the party is engaging in activities which are eligible
9 for the license.

10 THE WITNESS: Right.

11 ARBITRATOR VON KANN: If they want to do
12 that, then you are willing to talk to them about rates
13 and terms. But if they insist on doing things that
14 you believe render them ineligible, then it's your
15 view you can't really negotiate a license with them
16 because the statute doesn't permit it.

17 THE WITNESS: Right. But I think Mr.
18 Steinthal was accusing us of compelling parties to
19 negotiate under threat of litigation.

20 ARBITRATOR VON KANN: Perhaps he was.

21 THE WITNESS: We don't do that.

22 ARBITRATOR GULIN: How many webcasters

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1 have you contacted about the nature of their service
2 being interactive and work out an agreement with them
3 so that they changed their service so that it was in
4 your view therefore non-interactive outside of the
5 context of any discussions about a 112 and 114
6 license?

7 THE WITNESS: That is a good question, but
8 I just don't know the answer.

9 ARBITRATOR VON KANN: One more follow-up,
10 and then we'll give you the floor back.

11 Again this may not be within your
12 knowledge. We know that there are 58 more witnesses
13 to come, so we are patient. We can wait. But while
14 you are here, what you know we will suck out of you.

15 (Laughter.)

16 Do you know how the discussions got
17 cranked up between RIAA and 2,200 or whatever it is
18 folks out there. Did you send out a blanket letter to
19 all 2,200 or something saying we are ready to talk,
20 give us a call?

21 THE WITNESS: That is a good question.

22 ARBITRATOR VON KANN: You got responses

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1 from some and not others? What is the background that
2 led to these negotiations?

3 THE WITNESS: I think two things, if I
4 might. This 2,200 number I think is quite misleading
5 to the Panel. Later testimony may cover it, but
6 almost 2,000 of them alone or something like that are
7 broadcasters, which just until recently there has been
8 a dispute whether they would even be participating in
9 this panel. So they certainly weren't talking to us
10 and we weren't talking to them. The NAB, the National
11 Association of Broadcasters talked to us after the
12 Copyright Office ruling. So that is not an issue.

13 Then multiple numbers of URLs in that list
14 of 2,200 are all the same company. Viacom and MTV
15 alone have 15 or 16 different companies. So the
16 number is considerably less than this grand number.

17 But what we did after the passage of the
18 DMCA is I think take a very proactive and educational
19 attitude. We took seriously Congress' direction to
20 try and negotiate this with the parties because
21 frankly, and no personal offense, I wanted to avoid a
22 CARP. I thought that it would be better and more

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1 productive for these businesses and for certainly our
2 artist and record companies if we could have some
3 arrangements earlier on so that everybody could get
4 about the business of creating new opportunities for
5 the music business.

6 But we went to broadcast conventions,
7 streaming conventions. We did interviews with
8 magazines directed towards webcasters. We created
9 information on our website. We literally tried to
10 talk to anyone who would listen that we were open to,
11 kind of open for business for discussions in the
12 marketplace to try and accommodate their interests.

13 We very much viewed and still view,
14 despite the apparent atmosphere in this proceeding,
15 these people as our customers. We have had a service
16 goal in trying to close these deals.

17 ARBITRATOR VON KANN: So you sort of put
18 out as broad an announcement as you could that we're
19 interested in striking deals with you, for these
20 licenses.

21 THE WITNESS: Right.

22 ARBITRATOR VON KANN: Of course we can't

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1 do it if you are interactive, but if you are eligible
2 for the license, we want to try to get an agreement
3 with you.

4 THE WITNESS: Right.

5 ARBITRATOR VON KANN: Is that in essence
6 what you are saying?

7 THE WITNESS: Yes.

8 ARBITRATOR VON KANN: And do you know
9 about how many people harkened to the call and started
10 lining up at Mr. Marks' door or wherever they went?

11 THE WITNESS: I think that there have been
12 discussions on and off over time with somewhere around
13 35 or 40 different companies, but Mr. Marks would be
14 a better resource for that.

15 BY MR. STEINTHAL:

16 Q You mentioned both in response to the
17 Panel's questions and one of my questions earlier that
18 you viewed part of your role to be educational, right?

19 A Yes.

20 Q The fact is that you have told Congress,
21 for example, that many webcasters had a steep learning
22 curve, I think was your phrase, before understanding

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1 the ground rules. Right?

2 A Yes.

3 Q Is it correct that what you found in going
4 to the marketplace was that there were a lot of people
5 in the webcasting business that essentially had no
6 idea what they were doing legally?

7 A Yes.

8 Q So there was a high degree of naivete out
9 there, was there not?

10 A Well, I think that people creating these
11 businesses were focusing on what the technological
12 possibilities were and trying to find ways to do that
13 within the law. So I wouldn't call it naive. These
14 rules are complex. This is a new right. When new
15 rights are established, they often take a long time to
16 get settled into the marketplace, and we understood
17 that we had an educational role there. That's why we
18 actually didn't even pursue the interactivity issue
19 with Launch until almost three years after the right
20 was established because we viewed our role as
21 educational for a long time.

22 Q Let me just -- I can show you your

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1 testimony from June 15th. I just want to read a
2 paragraph of it. You can pass it out to the Panel as
3 well.

4 We need to mark it as SX Exhibit 2 -- 3,
5 sorry.

6 A (No response.)

7 (Whereupon, the document was
8 marked for identification as
9 Exhibit No. SX-3.)

10 (Whereupon, the proceedings went briefly
11 off the record at 2:51 p.m.)

12 BY MR. STEINTHAL:

13 Q I would ask you to look at SX Exhibit 3.
14 Is this a copy of your prepared remarks to the House
15 Judiciary Committee, Subcommittee on Courts and
16 Intellectual Property, June 15th, 2000?

17 A This is a download from a news service, so
18 I don't know if it is complete or not.

19 Q Do you recall having prepared --

20 A I'm trying to be responsive. There was a
21 hearing and I recall testifying. I am sure I had
22 written testimony.

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1 Q Take a look at the third page of this
2 exhibit. There is a paragraph that starts, "For
3 example."

4 MR. SCHECHTER: I'm sorry, the third page?

5 MR. STEINTHAL: Oh boy. I am working off
6 a different version.

7 MR. SCHECHTER: This is a four-page
8 document, a page of which is missing. If you look at
9 the bottom of page 2, it says "the goal of Congress
10 the", and then in my version -- I have got three pages
11 of what I think is supposed to be --

12 (Whereupon, at 2:52 p.m., the proceedings
13 went off the record, and went back on the record at
14 2:54 p.m.)

15 BY MR. STEINTHAL:

16 Q The paragraph I wanted to direct your
17 attention to, Ms. Rosen, is the one on page 2, second
18 to the last paragraph, where you say, "For example, we
19 have been successfully negotiating licenses with
20 webcasters for more than a year. The process is not
21 easy because many webcasters have a steep learning
22 curve before understanding the ground rules. But

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1 marketplace negotiations afford the parties the
2 opportunity to create flexible and mutually beneficial
3 agreements. We try to tailor the licenses to meet the
4 needs of each individual company. Given the variety
5 of business models employed by creative entrepreneurs
6 we realize this is not a one size fits all business.
7 Our ability to negotiate with different entities in
8 different ways works to the benefit of everyone."

9 Is that part of the testimony that you
10 recall having given to Congress on or about June 15th,
11 2000?

12 A Yes, and I am glad you entered it into the
13 record because it is quite a good background piece on
14 our attitude. You should read the whole thing.

15 MR. STEINTHAL: Then I'll offer it into
16 evidence and I doubt I'll get an objection.

17 MR. SCHECHTER: Enthusiastically agreed
18 to.

19 CHAIRMAN VAN LOON: So entered.

20 (Whereupon, the document
21 previously marked for
22 identification as Exhibit No.

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1 SX-3 was entered into
2 evidence.)

3 BY MR. STEINTHAL:

4 Q And that was accurate at the time that you
5 testified?

6 A Yes.

7 Q Let me ask you this. At the end of that
8 paragraph where you talked about the education curve
9 issue, you talk about the need to come up with a
10 flexible approach, not a one size fits all approach.

11 A Yes.

12 Q Are you familiar with your proposal in
13 this case?

14 A Yes.

15 Q Do you believe that the fee proposal that
16 the RIAA has come up with in this case is a flexible
17 as opposed to one size fits all proposal?

18 A I think it is as flexible as a one size
19 fits all proceeding can sometimes allow it to be.

20 Q Did anybody tell you this had to be a one
21 size fits all proceeding?

22 A Well I think what we tried to do and what

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1 this implies is both depending on a company's size,
2 revenue structure, and traffic, historically the
3 discussions break down into two different ways. That
4 people who either aren't making money right now but
5 intend to make money, otherwise why would you be in
6 this business, are more comfortable with a percentage
7 of revenue business so that as their business grows,
8 we'll grow with them.

9 Others have quite mature systems, like AOL
10 or Yahoo or MTV, and a per performance fee was
11 something that they would rather have. They didn't
12 want to be our partners. They wanted to pay on a per
13 fee.

14 So I think that this simply tries to give
15 the committee without too much detail, that sort of a
16 general outline of how those deals have been trying to
17 appropriate. I think the rates and the structure that
18 we proposed to the Panel follows along those same
19 lines.

20 Q You don't disagree with the notion that
21 you advanced to Congress that there is a need for the
22 rates to be fair and appropriate for each of the

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1 individual companies that are applying for a license
2 from the RIAA. Correct?

3 A Well I start with the fundamental premise
4 which is these companies are in business to make
5 money. There is not a reason for artists or record
6 companies to subsidize their startup costs.

7 What I think we have tried to do with a
8 percentage of revenue approach is say we recognize you
9 might not be making money yet, but as you grow we can.
10 So I don't really understand the problem with that.

11 Q Well the testimony seems to suggest that
12 there is a need to be flexible in connection with
13 taking into consideration the individual circumstances
14 of webcasters and how they use your music. All I am
15 asking is whether you have changed your mind at all as
16 to whether it is important for the fee proposals or
17 the fees that are to be set in this proceeding need to
18 be sensitive enough so that they are fair to the
19 different kinds of webcasters and broadcasters that
20 are participating in this proceeding and seeking to
21 access the compulsory license.

22 A I think our structure does that. I think

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1 that the webcasters who actually came to negotiate
2 these licenses were in the best position to determine
3 what was fair for them.

4 Q So is it fair to say that you agree in
5 principle with the statement that I made. And your
6 answer is in addition that you feel the current
7 proposal that the RIAA has made meets that criteria?

8 A Yes.

9 MR. SCHECHTER: Point of information. We
10 have been going for about an hour-and-a-half, and
11 although there was a break, the witness didn't leave.
12 I was curious, are we at a -- how much more do you
13 have?

14 MR. STEINTHAL: That's fine.

15 MR. SCHECHTER: Is it okay to take a --

16 MR. STEINTHAL: I am going to have a few
17 more minutes. I am not at the point where I am within
18 ten minutes of finishing.

19 CHAIRMAN VAN LOON: Why don't we take the
20 3:00 break. It's 3:00. Ten minutes.

21 (Whereupon, at 3:00 p.m., the proceedings
22 went off the record, and went back on the record at

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1 3:16 p.m.)

2 CHAIRMAN VAN LOON: Prompted in part and
3 to avail myself of the opportunity to read SX-0003, we
4 have come up with a minor procedural modification. We
5 would appreciate getting five copies of any exhibit
6 that is being used for cross rather than the four so
7 that the Chair can mark on one as well as colleagues.

8 BY MR. STEINTHAL:

9 Q Ms. Rosen, I wanted to ask you a couple of
10 questions back in the discovery vein, just trying to
11 find out the way things work. I am still a little
12 confused on the Sound Exchange RIAA relationship.

13 Does Sound Exchange actually negotiate or
14 does it just collect and distribute the royalties that
15 the RIAA negotiates?

16 A Sound Exchange has become the authorized
17 agent for the Sound Recording Copyright owner members.
18 But it didn't start out that way because we started
19 negotiations before Sound Exchange was officially
20 formed.

21 Q When was Sound Exchange officially
22 incarnated?

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1 A I think we started the member
2 solicitations sometime around the summer of 1999. It
3 was officially launched last November or December.

4 Q So currently the licensor in your deals
5 with webcasters is Sound Exchange. Correct?

6 A I think that's right.

7 Q But the RIAA negotiating committee is
8 still the committee that makes the decisions.
9 Correct?

10 A Well, the Sound Exchange board is made up
11 of record companies, both majors and independents as
12 well as artists representatives. The artists
13 representatives have now designated or are in the
14 process of designating individuals to serve as a
15 liaison to the negotiating committee to make sure that
16 everybody involved in Sound Exchange is also involved
17 in the negotiating committee, has a voice.

18 Q But then just so it's clear, the RIAA
19 negotiating committee is still the central entity in
20 determining yeah or nay on whether a license gets
21 done. But now an artist representative from Sound
22 Exchange is also sitting on that committee?

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1 A Yes. It is a liaison to that committee,
2 I believe, is the term. What I am trying to convey is
3 that they are de facto the same group of people
4 because the negotiating committee executives tend to
5 be the same ones who are on now the board of the Sound
6 Exchange. It was just formalized into Sound Exchange.

7 Q Sound Exchange also has responsibilities
8 for collecting and distributing --

9 A That's right.

10 Q Royalties. Right?

11 A Yes.

12 Q Now if I'm right, Sound Exchange is not
13 yet the designated company for purposes of collecting
14 and distributing all royalties collected under the
15 section 112, 114 license. Is that right?

16 A I think that's right. I think that the
17 Copyright Office, the register has to make that
18 decision.

19 Q But currently, pre any determination from
20 the Copyright Office on that, Sound Exchange is
21 charged with the responsibility of collecting and
22 distributing that which has already been collected

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1 under these voluntary licenses, right?

2 A Yes. I think that the distinction that
3 the Copyright Office makes and that we make is that we
4 have already been authorized to negotiate, collect,
5 and distribute for the actual members of Sound
6 Exchange, those people who have affirmatively signed
7 up. But there will necessarily be many copyright
8 owners, mostly small copyright owners, who have not
9 either heard about Sound Exchange or bothered to sign
10 up where there are going to be performances for those
11 works.

12 That is an expensive process to begin
13 those distributions. The Copyright Office, I think,
14 has asked us to distribute those monies as well, but
15 I don't think that those final decisions have been
16 made by the Copyright Office, or frankly, by Sound
17 Exchange.

18 Q Did I read correctly that there was an
19 announcement recently that the RIAA or Sound Exchange,
20 I should say, will not be making distribution this
21 year of the royalties collected from the webcaster
22 licensees?

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1 A That's right, I think we are distributing
2 the subscription licenses.

3 Q Is there any particular reason why Sound
4 Exchange is not yet distributing collections from the
5 webcasters?

6 A Well, I think until the monies come in,
7 until the membership is done, until the date is there,
8 you want to make it to be cost-effective. I think
9 that the board of Sound Exchange is the appropriate
10 body to determine when that is cost-effective, to
11 distribute to their own members.

12 Q I want to ask you a series of questions
13 about what was on your chart that was last up there.
14 So if I could get that back, the spoke chart, as I
15 would call it.

16 A (No response.)

17 ARBITRATOR VON KANN: With the bucks in
18 the middle.

19 MR. STEINTHAL: With the bucks in the
20 middle, that's right.

21 MR. SCHECHTER: We have now exceeded my
22 technical capabilities with the machine. I turned on

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1 the switch that I turned off, but there's no light
2 bulb on.

3 MR. STEINTHAL: Trying to sabotage my
4 prop.

5 BY MR. STEINTHAL:

6 Q Okay. I want to bring you back to the
7 subject matter of some of your testimony earlier.
8 Prior to this chart being up, you were shown a chart
9 that indicated, and I think you testified, that in the
10 last three years, the recorded music industry has been
11 achieving roughly \$14 billion in sales. Remember
12 that?

13 A Yes.

14 Q That is for the sales of essentially the
15 physical CDs, right? There's very little other kinds
16 of distribution today that account for that \$14
17 billion, right?

18 A Right.

19 Q Now these are what you call the
20 participants in the recording industry sales. I just
21 want to clarify a few things.

22 In the typical situation, I want to

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1 account for all these people in a different way than
2 you have, I suppose. In a typical situation, let's
3 take the retailers, the retailers are the ones, Sam
4 Goody, whoever it is, that sell the CD at \$13.98,
5 \$16.98, whatever it is. Right?

6 A Yes.

7 Q Now the record companies that are members
8 of RIAA typically sell to the retailers at what's
9 commonly called the wholesale price, right?

10 A Yes.

11 Q So the retailers get their bit which is
12 based on the difference between the wholesale and the
13 retail price, right?

14 A Yes.

15 Q Let's move them aside. The record company
16 then collects whatever the average is, whether it's
17 \$10 or \$11 per CD on average at the wholesale price.
18 Do you know what it is? Somewhere in that range?

19 A I don't know what the latest numbers are.

20 Q Okay. But whatever it is, they collect
21 it. And then --

22 A But some --

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1 Q Go ahead.

2 A Sometimes there are distributors in
3 between the record companies and the retailers.

4 Q We are going to get to that. It is on
5 your chart.

6 A Okay.

7 Q So isn't it true that what happens
8 basically is this wholesale sales price essentially is
9 collected by the label, and then they pay a variety of
10 costs, all of which are on your spoke. So let's take
11 the distributors. Actually let's start with, let's
12 take the manufacturer. The manufacturer is the
13 company that literally manufactures the physical CDs.
14 Right?

15 A Yes.

16 Q That is typically with respect to the
17 majors an affiliate of the major, right?

18 A It often is, but not always.

19 Q Okay. But it's often that case. Right?

20 A Yes.

21 Q Okay. So you pay a certain amount of
22 money to the manufacturer. Then of course the

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1 distributor. That is the company that gets the CDs to
2 Sam Goody and the like. Right?

3 A Yes.

4 Q And does the actual distribution.

5 A Right.

6 Q They get compensated as well out of the
7 wholesale receipts that the record company collects.
8 Right?

9 A Yes.

10 Q That is also typically a company with
11 respect to the majors that is an affiliate of the
12 major. Right?

13 A No.

14 Q It's not? You don't think the
15 distributors, Warner --

16 A No. For almost 25 percent of the
17 business, that will be a middle man like Anderson or
18 Valley or somebody else because what are called the
19 racks, the Walmarts and Targets and K-Marts, and
20 independent retail stores all use middle man
21 distributors, not record company.

22 Q But there are some record company

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1 affiliates that account for the other 75 percent of
2 the distribution?

3 A There are.

4 Q So we take from the amount collected. You
5 pay the manufacturers piece. You pay the distributors
6 piece, some of which goes to affiliates of the record
7 companies themselves. Then let's take another group.
8 You have got the recording artists. I just want to
9 get them all. You have called them featured artists,
10 background vocalists, background musician, and the
11 producer. They are the ones that have participated in
12 the creation, we'll call it from the artistic side of
13 the CD. Right?

14 A Yes.

15 Q And they all get paid a royalty or a
16 contractual amount that the record company is
17 obligated to pay them. Right?

18 A Yes.

19 Q And that comes out of the wholesale price
20 that the label collects. Right?

21 A Yes.

22 Q Then, as Mr. Sherman testified, the music

1 publishers and songwriters, they collect what is
2 called the mechanical royalty. They get paid again,
3 out of that wholesale price, they get a piece that is
4 dictated by Section 115 of the Copyright law for their
5 participation in the CD. Right?

6 A Yes.

7 Q And you would agree with me, would you
8 not, that as Mr. Sherman testified, typically the
9 rates paid for the publisher songwriter piece are
10 either at or under the statutory rate?

11 A Yes.

12 Q And one of the reasons why it is under the
13 statutory rate is -- well, there are two things I want
14 to ask you about. One is you are familiar with record
15 clubs, right?

16 A Yes.

17 Q Record clubs typically pay a three-quarter
18 rate. Right?

19 A That is changing, I understand.

20 Q Today? In the past, up until now, it has
21 been a three-quarter rate?

22 A I do not really know.

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1 Q And you have heard the phrase controlled
2 composition?

3 A Yes.

4 Q Those are situations where if I am a
5 record label and I am dealing with an artist who is
6 not only the performing artist, but the writer of the
7 music, I typically cut a deal with that artist to pay
8 a less than the statutory rate. Correct?

9 A Yes, but that is usually because the
10 artist wants more money as a cash advance in their
11 recording agreement so that they take it in the
12 recording agreement instead of in the songwriter
13 royalty. They want the cash upfront.

14 Q So the artists would rather have the cash
15 --

16 A It's all the same money.

17 Q To you it is, but on your spoke, it moves
18 from the music publisher side or the writers side to
19 the featured artist side. Right?

20 A Yes. You are just proving that \$14
21 billion doesn't go very far.

22 Q No. Here is where I want to get to is

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1 that you've got \$14 billion in sales. Right?

2 A Yes.

3 Q Then what the record company makes is the
4 \$14 billion minus what the manufacturer got, the
5 distributor got, the creative people got, and the
6 publisher songwriters got. Whatever is left, the
7 residual is what the record company gets per CD,
8 right?

9 A No.

10 Q Where am I wrong? I mean you collect \$10
11 or \$11 as your wholesale price. You pay all of the
12 constituent elements in your spoke chart. What is
13 left is what the label has from the sale of the CD.
14 Right?

15 A If what you are saying is after all of
16 those people are paid, the record label gets what is
17 left over, that is accurate.

18 Q Okay. That residual, what's left over, is
19 essentially the profit from the sale of the CD.
20 Right?

21 A No. Because a CD only goes into the
22 profit column once it has recouped all of its costs.

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1 It has nothing to do with just the sales. You have
2 got cash advances to the artists. You have got
3 advances often to the publishers. You have got
4 advances to the producers. You have got advances
5 often at the manufacturing or distribution level.
6 Then you have got marketing costs and you have got
7 promotion costs, and you have got advertising costs.
8 So you can't simply assume that it is a one-for-one
9 profit.

10 Q Let's do it this way. What the residual
11 is the revenue, is the net revenue from the sale of
12 the CD to the record company. Then whatever its other
13 costs of the nature that you've talked about, would be
14 deducted before you get to profit.

15 A Right.

16 Q Okay?

17 A Okay.

18 Q Now are you familiar with what the average
19 net revenue per CD is in the business these days?

20 A No.

21 Q Are you familiar with what the average net
22 profit per CD is?

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1 A I can't imagine there is an average net
2 profit. But no, I am not familiar with it.

3 Q Well, I mean the record companies aren't
4 in business not to make money, are they?

5 A Right. But as I said, you are essentially
6 dealing in bell curves when you deal with CDs. You
7 know, a single successful record will pay for 300
8 unsuccessful records. So do you argue that boy, you
9 have made so much profit here when what you have done
10 is essentially moved into investment in all of those
11 other recordings.

12 Q Let's call it average. Okay? Let's take
13 the aggregate revenue, the \$14 billion costs, all the
14 units sold, aggregate costs to all these people,
15 aggregate. That leaves you with an aggregate net
16 revenue number. You take out those other costs you
17 talked about, and you have an aggregate profit number.
18 Okay? If you average those, you are going to have an
19 average. All you have to do is divide by the number
20 of CDs sold that year, and you have an average per CD
21 number, even though I understand some CDs don't make
22 money and some make a lot of money.

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1 Are you familiar with, on that basis, the
2 average CD net revenue number or the average CD net
3 profit number?

4 A No. So I want to help you wherever you
5 are going with this, but there will be better
6 witnesses than me to talk about the actual dollars and
7 cents in a record company.

8 Q Now you draw a lot of attention in your
9 written testimony to the fact that most CDs don't make
10 money.

11 A Yes.

12 Q The reality however is that the theory of
13 the record business is that the hits, those that do
14 make money, will more than offset the CDs that are
15 created that don't make money. Right?

16 A That is the hope every day.

17 Q That is the reality of the business.
18 Right?

19 A Yes.

20 Q You spent a lot of time in your written
21 testimony as well on the gold records, the platinum
22 records, the diamond records, the ones that get those

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1 awards. You don't say in your testimony one way or
2 the other whether you need to sell a half a million
3 CDs to actually generate a positive return for a
4 label. Do you know whether or not you have to sell a
5 half a million?

6 A It will really vary on an artist-by-artist
7 basis. Michael Jackson's record is probably going to
8 have \$15 million of promotion costs there. He is
9 going to have to sell a lot of records to make that
10 up, but an artist that doesn't have that much
11 marketing or promotion maybe you wouldn't. So it will
12 always vary, depending on the other costs associated
13 with the recording and the production, and how many
14 videos you have and how much your clients charge for
15 space on their sites for ads and everything else.

16 Q Now you say in your written testimony that
17 the average number of new releases has increased
18 significantly over the last few years. Remember that?

19 A Yes.

20 Q I think you say that it has more than
21 doubled in the past nine years?

22 A Yes.

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1 MR. SCHECHTER: Can you give us a page?

2 MR. STEINTHAL: I think it was on page
3 eight.

4 THE WITNESS: Eight.

5 BY MR. STEINTHAL:

6 Q Have you heard on the subject of new
7 releases, have you heard the lament among members of
8 the recorded music industry that typical terrestrial
9 radio stations have become too hit-driven and don't
10 feature as wide a play list as they did in former
11 times?

12 A Yes.

13 Q And the label concern in that respect is
14 that there is less exposure for up and coming artists
15 and fringe artists. Right?

16 A Yes.

17 Q Is it correct that one of the big
18 advantages that you and other members of the record
19 industry have seen in the Internet is the ability to
20 reach a wider audience and go deeper and wider into
21 play lists because of the greater flexibility of that
22 medium?

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1 A Yes.

2 Q In that respect, would you agree with me
3 that there is a certain kind of promotional value to
4 webcasting that is unique to webcasting?

5 A Well, I think the nature of webcasting's
6 uniqueness is valuable for the music community, but I
7 don't think of it as a promotion vehicle. I think of
8 it frankly as a revenue opportunity, what we have. I
9 thought that that slide that Mr. Garrett showed
10 yesterday was probably the best illustration of that,
11 where you have maybe ten genres of music, like rock
12 would be a genre, or pop, or jazz, or classical. But
13 you can have webcasters with 10 or 12 sub-genres of
14 music. Now these are recordings that either frankly
15 never sell so nobody gets paid or record companies
16 really limit their investment in that. So if you have
17 got the opportunity for webcasting to create new
18 revenue sources, you can continue to invest in
19 different artists across the board.

20 So I think it is valuable for the music
21 industry, but clearly, it is valuable for the
22 webcasting community because you are offering a

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1 service that you couldn't otherwise offer. That is
2 what is going to get webcasters advertising. That is
3 what is going to get you viewers. That is what is
4 going to get you traffic. That is what is going to
5 get you your IPOs.

6 Q Let me ask you to take a look at an
7 interview that somebody claims they had with you.
8 Whether or not it's true, who knows.

9 A (No response.)

10 MR. STEINTHAL: We'll have this marked as
11 SX Exhibit No. 4, if it's not already so marked. It
12 is.

13 (Whereupon, the document was
14 marked for identification as SX
15 Exhibit No. 4.)

16 BY MR. STEINTHAL:

17 Q This apparently, for the record, purports
18 to be an interview with you by the Silicon Alley
19 Daily, and with a picture on the first page and the
20 like? Do you recall having given an interview to that
21 publication?

22 A Yes.

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1 Q Is this a copy of that interview, to the
2 best of your knowledge?

3 A I haven't a clue. Sorry. I do a lot of
4 interviews. I wouldn't know whether this is an
5 accurate transcript or not.

6 CHAIRMAN VAN LOON: I would ask you to
7 please keep your voice up because we're --

8 THE WITNESS: I do a lot of interviews.
9 I just wouldn't know whether this is an accurate
10 transcript or not. If there is something in
11 particular.

12 BY MR. STEINTHAL:

13 Q There is. So let's go to that. On page -
14 - it seems to be downloaded in sort of an odd --
15 sometimes it says out of 19, sometimes it says out of
16 20. Let me ask you to look at the, going from the
17 back, it's about five pages in, something marked page
18 4 of 19.

19 A (No response.)

20 CHAIRMAN VAN LOON: It comes shortly after
21 page 8 of 20.

22 (Laughter.)

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1 MR. SCHECHTER: Can I just note for the
2 record that this is not dated? It looks like it was
3 printed on June 29th, 2001, but that is not to suggest
4 that that is when the interview took place.

5 MR. STEINTHAL: No. It looks like it is
6 September 26, 2000, based on the --

7 MR. SCHECHTER: I see.

8 CHAIRMAN VAN LOON: At the very top, it's
9 October 23th and 24th.

10 MR. SCHECHTER: There is also a date in
11 the URL. There is confusion as to what the date of
12 this interview is.

13 THE WITNESS: It took place in Los
14 Angeles, I remember that, but I don't remember the
15 date.

16 BY MR. STEINTHAL:

17 Q There is a question and answer on the page
18 that is marked 4 of 19. The question is, "Do you
19 think there is a new paradigm of music that will be
20 formed around the class artists, the Internet that
21 is?" Then it goes on.

22 Your answer to this question, and it goes

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1 on to say, "But do you think" again the question,
2 "that the Internet in places like MP3.com and Napster
3 give the middle class artists for the first time the
4 ability to make a decent living?"

5 And your answer is as follows, "Yes. And
6 actually, it is not a given that major label artists
7 get taken care of so well. It is very tough to find
8 outlets for artists."

9 "One of the unfortunate things I think
10 over this last year for many people in the music
11 space, how many people in the audience are actually
12 working or living in the music space online. One of
13 the most unfortunate things about the sort of Napster
14 headlines is that it so overshadows so many other
15 interesting things that people want to do in the space
16 and so many other interesting promotional
17 opportunities for new artists who believe in their art
18 and believe in the value of their creativity. I have
19 always thought that not just the Internet, but
20 distribution systems beyond the Internet, are exactly
21 the kind of thing we need."

22 "One of the problems we have had in the

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1 music business that has been particularly exacerbated
2 by radio concentration is that five companies own the
3 whole thing. Five companies are basically programming
4 2,000, maybe 3,000 radio stations in the country.
5 They decide what gets on playlists across the country.
6 All of a sudden you don't get that opportunity for a
7 DJ or program director in Omaha to create a buzz about
8 a new artist. It just really doesn't happen that
9 much."

10 "So you absolutely have to have new
11 outlets. I don't think there is anybody in the music
12 business who doesn't agree with me that the Internet
13 is what we have been hoping would be the savior for
14 that."

15 Do you recall having answered in substance
16 a question, having said what I just read?

17 A I wish my grammar was better, if that's
18 really how I sounded. I think this does -- I don't
19 know if that is what I actually said, but this does
20 reflect my general view that the Internet and
21 webcasting are opportunities for the music community.
22 It is very much in my personal nature to try and find

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1 mutual benefit for everybody in new opportunities.

2 But I have been focused like a laser on
3 alternative revenue streams. I don't think any quote
4 anywhere that I might have said negates the fact that
5 I feel very strongly that artists and record companies
6 deserve to be fairly compensated in this new business
7 environment. That these are new businesses being
8 created by people expecting to make money. It doesn't
9 negate the fact that AOL spent \$300 million to get
10 into this business, even if it's a great opportunity
11 for us, we deserve some income too. So I don't think
12 it is inconsistent to suggest that there is mutual
13 benefit.

14 Q No one is here on our side suggesting that
15 there shouldn't be a fair royalty. The question is in
16 respect of this interview, did you agree or did you
17 say that the Internet provides promotional
18 opportunities for artists that are of extreme
19 importance?

20 A I think promotion is important, but I
21 don't think that it is in a vacuum. Like I said, I
22 thought Mr. Sherman's example of the book was a good

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1 example. You know, motion picture companies want to
2 promote their next animated feature, but they still
3 charge McDonalds to put those pictures all over the
4 cups. It is great promotion for the movie, but guess
5 what, McDonalds is getting a benefit. So I think that
6 the mutual issue of promotion in this regard is very
7 common in the entertainment business. I don't think
8 it justifies a lower rate. I think the rate should be
9 based on the fair market value that the user is
10 getting for the work, not on some presumption of the
11 benefit of the copyright owner.

12 I think it is sort of for us to decide
13 what is in our interests, not frankly, for you.

14 Q What about this panel. Don't you think it
15 is for them to decide in a compulsory license scheme
16 what the value of compensation should be, rather than
17 what you in your infinite wisdom might otherwise say?

18 A That wasn't what I said. The Panel
19 clearly has to decide what the right number is, but
20 what I am saying is I don't think it is appropriate
21 for you to suggest that you are helping us and
22 therefore we deserve less. I think that it is

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1 appropriate for us to decide what helps us.

2 Q Let me ask you this.

3 A I wouldn't make that decision for you.

4 CHAIRMAN VAN LOON: Please allow the
5 witness to finish.

6 THE WITNESS: You know, the rates are
7 clearly within this panel's purview, but the
8 presumption, the constant presumption that they are in
9 this business to do us a favor just, you know, we all
10 get the point. We just don't agree with it.

11 BY MR. STEINTHAL:

12 Q It's not my point, Ms. Rosen.

13 You are familiar with the statute, aren't
14 you? I mean you lobbied for it. You know what the
15 standards are, right?

16 A Yes.

17 Q You heard Mr. Garrett yesterday.

18 A Yes.

19 Q This panel is mandated to consider, is it
20 not, the promotional value of the webcasters' use of
21 sound recordings versus the degree to which their use
22 of the sound recordings would displace record sales.

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1 Right?

2 A I am not in a legal position to interpret
3 the weight of the statute for the Panel. That, I
4 think you all have done that adequately.

5 Q I submit to you that when I am asking you
6 questions about promotional value, I am not trying to
7 do anything other than elucidate evidence that the
8 statute requires this panel to consider.

9 A (No response.)

10 MR. SIGALL: Is that a question?

11 BY MR. STEINTHAL:

12 Q In your testimony, you say that the Panel
13 should be guided by the 26 webcaster deals that the
14 RIAA has done. Correct?

15 A Yes.

16 Q Right on the first page you say that you
17 believe that the "real world negotiations" underlying
18 those deals provide the best guide. Right?

19 A Yes.

20 Q Is there any difference between what you
21 mean by "real world negotiations" and willing buyer,
22 willing seller marketplace?

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1 A No.

2 Q So you would equate the two?

3 A Yes.

4 ARBITRATOR VON KANN: Can I get some
5 clarification here on a point that was raised earlier?
6 If Music Casts has recently signed a license agreement
7 with RIAA.

8 MR. STEINTHAL: Music Match.

9 ARBITRATOR VON KANN: Music Match. I'm
10 sorry. Why are they still a party to this proceeding
11 or are they still?

12 MR. STEINTHAL: They are not. They have
13 filed a motion to withdraw.

14 THE WITNESS: They withdrew.

15 ARBITRATOR VON KANN: I see. Okay. Thank
16 you.

17 MR. STEINTHAL: I don't know whether the
18 motion has been granted yet, but they have filed a
19 motion to withdraw.

20 BY MR. STEINTHAL:

21 Q Now your reference to "real world
22 negotiations" however, suggests that you believe that

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1 not all types of negotiations are of the same quality.

2 Is that a fair statement?

3 A I do not know what you mean.

4 Q Well, do you distinguish between "real
5 world negotiations" and other kinds of negotiations
6 that don't rise to the same level in terms of your
7 views as to how valuable a benchmark they would be?

8 A You mean like -- I don't know what you
9 mean. In the animated world, the virtual world?

10 Q No. Yesterday, for example, during my
11 opening you started to laugh over the example about
12 what somebody in the desert, parched after three days,
13 would be willing to pay for water.

14 A Right.

15 Q Now is that sort of an unworldly
16 negotiation in your view as opposed to a real world
17 negotiation?

18 A It was rude of me to laugh, and I
19 apologize for that. But there were two examples that
20 you gave yesterday, since you asked, that I reacted to
21 with some confusion because the parched in the desert
22 theory doesn't apply here. There is a compulsory

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1 license. No one is starving for music. They get the
2 music whether they negotiate with us or not.

3 In the second example you gave, which I
4 recall was something like is it willing buyer, willing
5 seller if someone wants to skip the line. You know,
6 the ticket might only be 50 cents to stand in the
7 line, if you are in the line. But you are willing to
8 pay 15 bucks to go to the front. There is no line
9 here. There is no parched desert. This is a
10 compulsory license. Everybody gets the music whether
11 they have a deal with us or not.

12 So it has always been our perspective that
13 we have nothing to compel people to the table. We had
14 no power, no leverage in these negotiations. This was
15 merely whether these people wanted a deal or not.
16 That is why I thought that your analogy just didn't
17 apply.

18 Q Because you say that all they want is the
19 music and they get the music under the compulsory
20 license. Right?

21 A That --

22 Q That is what you said, right? That is why

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1 there is no --

2 A What I said, if that is what they want is
3 the music. But I think that people came to the table
4 because they were looking for other things like
5 business certainty. They wanted to know exactly what
6 the rate was going to be. They wanted to make sure
7 that despite the obvious wisdom of this panel that
8 they would have a percentage deal or a per performance
9 deal. I mean there are different things. But they
10 didn't need to come to us to be in business. That is
11 the central underlying factor of a compulsory license.

12 Q What about situations like Music Match?
13 They needed to come to you to get a license or else
14 they were going to be --

15 A No, they didn't.

16 Q Continuing to be in an infringement
17 lawsuit, weren't they?

18 A No, they did not. They did not need to
19 get a license to do what they did. They needed to
20 either get an interactive license or change their
21 features, but they didn't need to get a statutory
22 license from us, but apparently they chose to do so.

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1 Q Part of that deal was the release of
2 infringement claims, was it not?

3 A Not the statutory piece. The only way we
4 would release the infringement claims is if they
5 changed their interactive features. Those were the
6 only claims against them, not that they were violating
7 the statutory license.

8 Q Claims for the prior were released, were
9 they not?

10 A I think you'll have to ask Mr. Marks, but
11 I believe that they actually made a payment that
12 brought them current with the statutory license.

13 Q As part of the settlement, right? The
14 RIAA negotiated a damages award for the prior period.
15 Is that right?

16 A I think it was the prior period of
17 interactive violations. I don't think -- it's not
18 connected to the statutory license.

19 Q And if people have as part of the reasons
20 that they want to do a deal with the RIAA, reasons
21 beyond just having the music, don't you think that
22 that affects their willingness to pay? Just like the

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1 fellow in the desert or the person at the toll, that
2 their motivations in a given situation may warrant
3 their paying more for a product that somebody else,
4 not having the same motivations or the same
5 circumstances, might be willing to pay?

6 A It is a different issue to somehow suggest
7 that they were compelled to pay that rate.

8 Q Nobody said compelled.

9 A They were not compelled. They were
10 willing buyers, willing sellers.

11 Now the value is in the music. The
12 individual services are up to the companies. I assume
13 your clients have the same interests in getting the
14 music as anybody else.

15 Q That is an assumption that the RIAA needs
16 to show, to show that people are in comparable
17 circumstances.

18 A (No response.)

19 MR. SCHECHTER: Is that a question or a
20 speech?

21 MR. STEINTHAL: No, it's not. I have no
22 further questions.

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1 ARBITRATOR GULIN: Before we go on, I do
2 have a question.

3 Ms. Rosen, you were here for the cross
4 examination of Mr. Sherman?

5 THE WITNESS: Yes.

6 ARBITRATOR GULIN: Do you recall some
7 questions, I don't recall who it was that asked the
8 questions, it had to do with how the proceeds of the
9 sale of a unit or CD or any kind of phonograph record
10 was divvied up among the copyright owners. Do you
11 remember that line of questions?

12 THE WITNESS: I think so.

13 CHAIRMAN VAN LOON: In reference to the
14 two baskets.

15 THE WITNESS: Right.

16 ARBITRATOR GULIN: The two baskets. There
17 was a suggestion that the record companies, and
18 therefore the performers, get a lot more from the sale
19 of a CD. Correct?

20 THE WITNESS: Yes.

21 ARBITRATOR GULIN: You wouldn't suggest
22 from that, you wouldn't infer from that, would you,

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1 that the value of the sound recording right is greater
2 than the value of the musical works right, would you?

3 THE WITNESS: From that example?

4 ARBITRATOR GULIN: Just from that example.
5 I know what your opinion is, but just from that
6 example, we shouldn't make that kind of an inference,
7 should we?

8 THE WITNESS: No. I thought that the
9 example wasn't illustrative enough of the ratio of
10 income.

11 ARBITRATOR GULIN: No. It wasn't
12 illustrative of that point, I understand that. I just
13 want to make sure that this separate point is we
14 shouldn't make that inference.

15 THE WITNESS: Right. I guess.

16 ARBITRATOR GULIN: You agree?

17 THE WITNESS: I don't think that the ratio
18 is an appropriate reason for you to make that
19 decision. I think the value of the sound recording
20 can be evaluated independently of that analogy, if
21 that is what you are asking.

22 ARBITRATOR GULIN: I guess it is, but I

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1 mean simply in a vacuum, just looking at that
2 situation, the fact that the record companies are
3 making more money from the sale of each unit, that
4 does not in and of itself imply that the performance
5 right and sound recordings is worth more than the
6 performance right in the musical works.

7 THE WITNESS: No. Because it is the
8 investment in the sound recording, not the return in
9 the sound recording that creates the value.

10 CHAIRMAN VAN LOON: Folks in the back
11 can't hear again.

12 THE WITNESS: I think it is the investment
13 in the sound recording, not the return that creates
14 the value. The ratio between the musical work and the
15 sound recording, I mean as a percentage of their
16 income, sales from CDs for songwriters and music
17 publishers is quite important. So to say because as
18 an overall dollar amount it is less than the sound
19 recording copyright owners get, there is less
20 promotion for them, I think isn't really a relevant
21 comparison.

22 ARBITRATOR GULIN: And the sale of a CD is

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1 a completely free market transaction. The market
2 decides what you can get for a CD, and therefore, what
3 the performers will make.

4 THE WITNESS: Right.

5 ARBITRATOR GULIN: Whereas what the
6 composers make is in fact regulated by I guess it's
7 115, isn't it, the mechanical license?

8 THE WITNESS: Right.

9 ARBITRATOR GULIN: That's not a free
10 market rate.

11 THE WITNESS: It is negotiated often in
12 the free marketplace and then approved by the --

13 ARBITRATOR GULIN: But it is never higher
14 than 115?

15 THE WITNESS: Rarely.

16 ARBITRATOR GULIN: Okay. Thank you.

17 THE WITNESS: Can I say something?

18 ARBITRATOR GULIN: Can you explain your
19 answer?

20 THE WITNESS: I was just going to say I
21 think that the relevant comparison and what I think
22 you will hear more articulately from witnesses like

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1 Mr. Alschul and some of the other record company
2 executives and the artists is that while a brilliant
3 and important step is created in the underlying song
4 when it's written, the reason people want to buy it
5 and the reason it has economic value is because of the
6 physical and financial investment that the artists and
7 record companies make into making that musical work a
8 recording.

9 In fact, if people were just going to read
10 sheet music over webcasting, then you could sort of
11 assess that value. But what these guys want are the
12 recordings. So that is the value.

13 CROSS EXAMINATION

14 BY MR. KIRBY:

15 Q Ms. Rosen, I am Tom Kirby.

16 A Still.

17 Q Still. Excellent memory. That is good in
18 a witness.

19 A very wise woman is reported once to have
20 said of the record business, "This is a business built
21 on promotion. We have been giving music away to radio
22 stations for 30 years." Do you have any idea of who

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1 that woman might have been?

2 A I'm sure you are going to tell me it was
3 me, but I don't know the context of that statement.

4 Q Well, would you agree with that statement
5 in the context of this hearing? That the record
6 industry is a business built on promotion. We have
7 been giving music away to radio stations for 30 years.
8 Is that true?

9 A I don't know if those two sentences follow
10 because promotion is our business in the broader sense
11 as opposed to radio promotion. I mean what we do is
12 try and publicize artists. So this is a business
13 built on promotion.

14 Q Let's break the ideas down. We agree that
15 the record industry is an industry built on promotion.
16 Can we agree with that?

17 A Yes, but --

18 Q All right. Now --

19 A In the broad definition of promotion.

20 Q All right. I understand.

21 A Okay.

22 Q Now part of that promotion has to do with

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1 getting radio stations to play records, right? Play
2 recordings.

3 A Yes.

4 Q All right. Do you have any idea how much
5 the recording industry spends every year trying to get
6 radio stations to play recordings?

7 A No, but I am sure it's a lot.

8 Q I am sure it is too. It is hundreds of
9 millions of dollars, isn't it?

10 A That sounds high, but I don't know how
11 much it is.

12 Q Putting that particular specific number
13 aside --

14 A Then you can surely afford to give less
15 than a million back.

16 Q You are not suggesting that any of that
17 money actually goes to the radio stations, are you?

18 Putting all that aside, let's focus on
19 what today are CDs. Radio stations don't typically
20 buy the CDs that they play, do they?

21 A No.

22 Q There is a longstanding tradition that

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1 they are given those CDs, or it used to be vinyl
2 recordings. They are given those by the studios,
3 isn't that right, the recording companies?

4 A Yes.

5 Q Now those CDs, the physical CDs, are the
6 property of the recording companies. Isn't that
7 right?

8 A Yes, I believe technically that's
9 right.

10 Q And before that the vinyl records would
11 have been the property of the recording companies,
12 right?

13 A Yes.

14 Q And there is no question, never has been
15 any question in anybody's mind that the record
16 companies were entitled to get a profit from their
17 physical property if they wanted to do it, is there?

18 A You mean on the radio?

19 Q On the CDs. They are entitled, it's their
20 property, they are entitled to profit from that,
21 right?

22 A Well, the CDs that are sent to radio are

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1 typically different than that which is sold in the
2 stores.

3 Q But it's still theirs, and they don't have
4 to send it to the radio stations. Do they?

5 A No. They send it of their own free will.

6 Q They could indeed instead tell the radio
7 stations, "Go out and buy it if you want to play it."
8 Right?

9 A Yes -- I don't know the copyright law well
10 enough.

11 Q I am not aware of any statute to compel.
12 Although it seems like there must be because it has
13 been going on for a long time.

14 A I was thinking about the radio exemption.

15 Q That is my point. My point is simply
16 this. That in an area where it is unquestionably true
17 that the record companies have property that they
18 could charge for if they chose, they choose instead to
19 give that property to the radio stations, don't they?

20 A I think you have successfully established
21 that radio stations get music for free from record
22 companies, and that record companies encourage them.

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1 But that is not what is at issue in this proceeding.

2 Q What's at issue in this proceeding is
3 another type of property. Right?

4 A No. What is at issue in this proceeding
5 is the new rules that were written for new kinds of
6 radio services that weren't subject to the same rules
7 that old analog radio is subject to. So yes, it
8 doesn't exist today, and everybody is happy and people
9 give millions of dollars.

10 But what the Performance Rights Act tried
11 to establish and what the DMCA --

12 Q I think we are getting beyond your direct
13 testimony.

14 A (No response.)

15 CHAIRMAN VAN LOON: Please allow the
16 witness to finish.

17 THE WITNESS: He's right. I was taking
18 advantage. Should I keep going? I think you have
19 established, 100 people you could ask, you know, you
20 are right. Radio doesn't pay now. We work
21 cooperatively. But I think I don't know how many
22 times to say this and other witnesses may say it much

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1 more articulately than I do, the goal was new
2 businesses, new rules. That is what Congress did.
3 That is what we think is appropriate. That is the
4 basis of our testimony.

5 BY MR. KIRBY:

6 Q But still today you give away those CDs.
7 Right?

8 A Yes.

9 MR. KIRBY: Thank you. Excuse me one
10 second.

11 I have perhaps good news and bad news,
12 Your Honor. The good news is with one exception, that
13 is as far as we would want to go with this witness.
14 There will be some other examination.

15 The bad news is there is one other exhibit
16 I wanted to briefly explore with this witness. It is
17 being copied at the moment. I wonder if I could yield
18 the floor to my colleague and then resume. I realize
19 this is not normal procedure, but I would just like to
20 come back and deal with that one exhibit. I think it
21 is going to be a five or six minute examination.

22 CHAIRMAN VAN LOON: It certainly doesn't

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1 seem like that would bring an effusive tag team of the
2 witness. We do want to keep moving forward. So we
3 will be delighted to hear from Ms. Leary.

4 MR. SCHECHTER: No objection. Certainly
5 no objection from us, Your Honor.

6 MS. LEARY: Thank you. Would you like me
7 to speak real slow?

8 (Laughter.)

9 CROSS EXAMINATION

10 BY MS. LEARY:

11 Q Good afternoon, Ms. Rosen. I have a
12 couple of questions. When you were discussing the
13 RIAA's approach to negotiating licenses under section
14 114 and 112 that are at issue in this proceeding, one
15 of the things you said is one of your fundamental
16 premises is that these companies or webcasters are in
17 business to make money. Is that correct?

18 A (Inaudible.)

19 Q You would agree, would you not, that the
20 business of making money, the profit motive, if you
21 will, does not apply to the non-profit world?

22 A Yes.

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1 Q By definition, public radio must be non
2 commercial. Would you agree with that?

3 A Yes.

4 Q So that is not a motive for why we do our
5 webcasting, is it?

6 A No.

7 MS. LEARY: I have no further questions.

8 (Whereupon, at 4:04 p.m., the proceedings
9 went briefly off the record.)

10 CHAIRMAN VAN LOON: Am I correct in
11 understanding that after this then there is no further
12 cross of Ms. Rosen? And you all are prepared then to
13 go forward with the next witness?

14 MR. SCHECHTER: I would like a brief
15 break, and then a brief redirect.

16 CHAIRMAN VAN LOON: Some brief redirect.

17 MR. SCHECHTER: Unfortunately, our next
18 witness does not land at Dulles Airport until 4:30.

19 THE WITNESS: A longer redirect.

20 CHAIRMAN VAN LOON: That would appear to
21 be mission impossible. Thank you then. Let's
22 continue with this.

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1 ARBITRATOR VON KANN: Can I make just the
2 observation? I am a little concerned that if we have
3 too many days like that we won't make our projected
4 schedule. So I do think it may be necessary for the
5 parties to reassess a little bit the schedule. You
6 may have been a little too easy going in spreading
7 your witnesses out that way, I don't know.

8 MR. SCHECHTER: As we all know, this is
9 the first day of testimony. We will continue to
10 reassess as we go along. I apologize for the
11 inefficiency. It is difficult. The gentleman is
12 coming in from California.

13 CHAIRMAN VAN LOON: Perhaps the hope was
14 that the procedural disagreements would have filled
15 even more time.

16 MR. GARRETT: I can raise a few.

17 CHAIRMAN VAN LOON: Mr. Kirby?

18 CROSS EXAMINATION (continued)

19 BY MR. KIRBY:

20 Q Ms. Rosen, have you had a chance to look
21 at the exhibit that was just handed to you? If not,
22 take a minute.

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1 A (No response.)

2 MR. SCHECHTER: Is it numbered?

3 MR. KIRBY: It has not been numbered yet.

4 CHAIRMAN VAN LOON: The one at the bottom
5 says RIAA-B-0007.

6 ARBITRATOR GULIN: So we're at SX-0005.

7 (Whereupon, the document was
8 marked for identification as
9 Exhibit No. SX-5.)

10 THE WITNESS: Can I inquire something, Mr.
11 Chairman?

12 MR. SCHECHTER: Excuse me. This exhibit
13 is marked restricted.

14 CHAIRMAN VAN LOON: Could we please one at
15 a time. First, has this been distributed to anyone
16 other than counsel? No? Okay. It is marked
17 restricted.

18 MR. KIRBY: I am hoping I won't ask a
19 question that will trigger a concern. I will be glad
20 to tell you what I'm going to ask. I can't come to
21 you, but you come to me.

22 MR. SCHECHTER: Can I bring the client?

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1 MR. KIRBY: You may bring the client.

2 CHAIRMAN VAN LOON: Let's go off the
3 record.

4 (Whereupon, at 4:07 p.m., the proceedings
5 went briefly off the record and resumed in Closed
6 Session.)

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1 ARBITRATOR GULIN: Mr. Garrett, were there
2 any other procedural matters, from any of the parties
3 that we need to discuss that would fill up some time?

4 MR. JACOBY: We have one procedural matter
5 and I don't think it will take more than 5 or 10
6 minutes to discuss here.

7 ARBITRATOR GULIN: And the NPR thing which
8 I don't think should take very long, but I assume
9 we'll do that after Mr. Schechter's Redirect.

10 We've got how much Redirect?

11 MR. SCHECHTER: Ten or 15 minutes at the
12 most.

13 ARBITRATOR GULIN: So maybe another 5 or
14 10 minutes of Cross after that, Recross? Another half
15 hour of testimony on the outside, maybe 15, 20
16 minutes.

17 MR. GARRETT: She is on her way here and
18 you can make your decision as to whether we want her
19 to go on or not.

20 CHAIRMAN VAN LOON: We'll see where we
21 are. We're inclined to move forward, give them the
22 opportunity to prepare for Cross and perhaps it's

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1 worth considering whether there are -- whether there's
2 anyone else who is local from later in the
3 presentation that could be available then tomorrow if
4 we would otherwise have time, extra time to consider.
5 I don't know whether that would work.

6 COURT REPORTER: Are we in open session?

7 CHAIRMAN VAN LOON: Yes, we are back in
8 open session.

9 Please proceed, yes.

10 REDIRECT EXAMINATION

11 BY MR. SCHECHTER:

12 Q I just want to clarify a couple of points
13 here, Ms. Rosen. If you could go back to Figure 4 and
14 I'm not going to put it up on the chart, a couple of
15 different numbers were thrown around. One was a \$14
16 billion number and the other was a \$10 billion.

17 Could you put those two numbers in
18 context, please?

19 MR. STEINTHAL: Can I object? I'm not
20 sure what \$10 billion number you're talking about.

21 ARBITRATOR VON KANN: You said \$10 or \$11
22 per CD.

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1 MR. SCHECHTER: You're right.

2 ARBITRATOR VON KANN: Not \$10 billion.

3 MR. SCHECHTER: You're right.

4 BY MR. SCHECHTER:

5 Q Let's put the \$14 billion figure in
6 context, look at page 6 of your testimony.

7 A I think the value in looking at that again
8 is that at one point it seemed to be suggested that
9 record companies receive \$14.3 billion in the Year
10 2000 and it's just worth noting, I think for the
11 record that that is the retail cost, wholesale cost is
12 40 percent less. So the monies that get divided are
13 significantly less.

14 Q So it's 40 percent so 16 we're looking at
15 subtract 5 and a half, essentially from the 14.

16 A Right.

17 CHAIRMAN VAN LOON: So it's for the
18 retailer portion, is that what you're doing?

19 MR. SCHECHTER: Yes.

20 CHAIRMAN VAN LOON: Okay.

21 THE WITNESS: Yes.

22 ARBITRATOR VON KANN: And then the balance

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1 has to be distributed among all these?

2 MR. SCHECHTER: Not the 14.3 that's
3 distributed.

4 BY MR. SCHECHTER:

5 Q There were discussions of the 25 deals and
6 interactivity and I just wanted to make sure I
7 understood your answer. Do you know of any of the
8 other -- whether any of the other 25 deals involved
9 interactivity at all?

10 A No. As far as I understand the only
11 licensee where interactivity was ever an issue was
12 Music Match.

13 Q You mentioned in response to one of Mr.
14 Steinthal's questions on interactivity a resolution
15 with listen.com. Could you describe that for me,
16 please?

17 A I'm not sure it was clear. I think that
18 it was in response to a question about, that somehow
19 we used the lawsuit with Music Match to get a deal on
20 the statutory license, therefore proving that they
21 weren't a willing buyer. And so I said well, we had
22 a lawsuit with listen.com where we settled that

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1 lawsuit amiably without a statutory license deal so it
2 wasn't a condition of settling a lawsuit to sign a
3 statutory license deal. Is that clear?

4 Q One last question on that. What was the
5 lawsuit about?

6 ARBITRATOR VON KANN: With listen.com?

7 BY MR. SCHECHTER:

8 Q Yes, with listen.com.

9 A The lawsuit with listen was also -- they
10 were in the interactivity lawsuit.

11 Q And that's been settled?

12 A That's been settled.

13 Q And do you know whether they're still a
14 party in this proceeding for their DMCA compliant
15 activities?

16 A As far as I understand listen is a part of
17 the webcasters case in this proceeding.

18 Q You started to describe the market as you
19 understand it of webcasters and I think you started to
20 describe that a significant number of them were
21 broadcasters. Could you just very briefly tell us
22 what your view of the overall internet marketplace is,

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1 who the players are?

2 A I think -- if we're all honest here, there
3 are three major players in the webcastic area. It's
4 AOL, Viacom and Yahoo. They have the most traffic.
5 They have the most services and they're the biggest
6 companies. And I think that it came up in the context
7 of my involvement in the Yahoo deal and my desire
8 really to avoid arbitration and it was my perception
9 and perhaps my incorrect perception that if we worked
10 hard to get at least one of those deals closed, that
11 the others would follow and therefore we could avoid
12 an arbitration.

13 I learned though that the webcasters -- so
14 what had happened was Congress gave us an antitrust
15 exemption in negotiation and gave the webcasters an
16 antitrust exemption to negotiate. They have a trade
17 association called DMA, the Digital Media Association.
18 I think that's what it stands for.

19 It became apparent that not all of DMA's
20 members had the same view about this so we could no
21 longer negotiate with the trade association. We were
22 there for dealing with the individual companies. At

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1 that point the goal was, I think, to address really
2 the significant players in this business, Yahoo, AOL
3 and MTV and see if those deals could follow.

4 It became apparent though after the Yahoo
5 deal was closed, we were in discussions with another
6 one of those majors and we were told by them
7 essentially that this thing was headed for a CARP.
8 DMA that told them that any deal they did would be
9 subject to -- would hurt everybody else in the CARP
10 and so they didn't want to do a deal.

11 When that was the precise reason we were
12 actually doing the negotiations with Yahoo, so I think
13 as a practical matter, there are some small players
14 which it's clear our 25 deals are representative of.
15 They clearly have some smaller webcasters that are
16 still in the proceeding, but this market was really
17 driven by those big three.

18 Does that elucidate?

19 Q Fine, thank you. Last, I think the last
20 question.

21 ARBITRATOR VON KANN: Have to keep track
22 of the Big 5 and the Big 3.

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1 THE WITNESS: Before you even get to the
2 broadcasters.

3 ARBITRATOR VON KANN: The other Big 5.

4 BY MR. SCHECHTER:

5 Q There was a reference in your cross
6 examination to the costs involved with Sound Exchange.
7 Just on a big picture basis what does Sound Exchange
8 have to do in terms of its collection and distribution
9 activities?

10 A Well, this is clearly an investment on the
11 part of the artists and record companies. We are --
12 we've set up this collective to receive money to
13 create a data base to do collections and distributions
14 and for us and the artists groups this has been a
15 multi-million dollar investment that the webcasters
16 and broadcasters just have to write a check and in my
17 view, I said this earlier, should pay more because
18 their transaction costs are so little. But we
19 actually have a lot of transaction costs in collecting
20 and distributing these monies.

21 Q I have nothing further.

22 RECROSS EXAMINATION

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1 BY MR. STEINTHAL:

2 Q First of all, Ms. Rosen, did you discuss
3 the subject matter of your Redirect with counsel?

4 A Before today?

5 Q No, in the break, before you just
6 testified?

7 A Yes.

8 Q Now you mentioned listen.

9 A Yes.

10 Q On your Direct, of course, you had very
11 little recollection of the Music Match litigation.
12 You didn't even know, as I recall, you didn't remember
13 whether it was New York or California, right on the
14 Music Match litigation?

15 A Right.

16 Q Is your testimony that listen was sued?

17 A I think actually I made the point about
18 listen in the Cross. I said what I just said prior,
19 but you kind of cut me off and changed the subject, so
20 that's why I asked counsel to -- I asked counsel
21 whether my point was clear.

22 Q Is it your testimony that listen.com was

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1 sued?

2 A Listen.com was in the declaratory action
3 against us.

4 Q But they didn't get sued for infringement,
5 right?

6 A They were not in the original suit with
7 Launch, right and then they settled after the
8 declaratory action.

9 Q And isn't it true that they were told that
10 if they did a deal then they wouldn't get sued?

11 A No. They were told the same thing -- you
12 mean a statutory deal?

13 Q Just a deal, any deal?

14 A You constantly have to distinguish between
15 a deal on the interactive versus the statutory. On
16 the interactive, the issue of whether or not to sue is
17 always a matter of enforcement of the statute. It has
18 nothing to do with the statutory deal. So yes, what
19 we said was we made our case clear. After they were
20 -- the declaratory action was filed against us, we
21 felt we had no choice but to then take action against
22 those companies and we told those companies we

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1 believed their services were interactive. We knew
2 they filed a declaratory judgment. If they didn't
3 want us to then retaliate, they needed to change our
4 service.

5 Q And during that interim period, right in
6 that interim period, the RIAA did a deal with listen,
7 did it not, whereby listen agreed that for the payment
8 of a certain amount of money and the withdrawal of the
9 skip feature and consumer ratings feature it had on
10 its site, then the RIAA would release and all of the
11 members of the RIAA, the majors, would release any
12 claims they had for infringement up to the date of
13 that settlement, right?

14 A Yes, but that's exactly the appropriate
15 issue. I mean what you tried to do before was suggest
16 that we were using the interactive suit as a way to
17 get the statutory license to try and prove that they
18 weren't willing buyer rates under the statutory
19 license and what I'm saying is the listen case makes
20 it clear that we were willing to settle the lawsuit
21 either way, that the goal of settling the lawsuit was
22 to deal with the interactivity issue and not dealing

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1 with the statutory rate.

2 Q With all due respect, my goal is to find
3 out exactly what happened, okay?

4 A I believe that, but that wasn't your
5 inference.

6 Q So listen, basically does a deal, pays you
7 money, withdraws certain features and gets a release
8 of infringement claims from your members during that
9 intervening period, right?

10 A That's right, just like if they had been
11 a CD manufacturing plant. The same thing, stop the
12 infringement and deal with it differently. That had
13 nothing to do with the statutory license and I think
14 the difference between those two settlements proved
15 that. That was my point.

16 Q Who is the nameless person that you were
17 having the conversation with at either MTV or AOL that
18 you told the Panel about? You mentioned you had this
19 conversation with somebody. It's got to be a person.
20 And you said you did the Yahoo deal and you had this
21 conversation with--

22 A Judy McGrath, the president.

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1 Q Excuse me?

2 A The president, Judy McGrath.

3 Q President of MTV?

4 A President of MTV.

5 Q So was there anyone else you had a
6 conversation with at either AOL or MTV that was the
7 subject matter of the testimony that you gave here?

8 A No. We had many discussions with MTV over
9 the course of the last year and I was involved in some
10 of them and that would have been with Judy McGrath and
11 her counsel, David Sussman.

12 Q I have no further questions.

13 CHAIRMAN VAN LOON: Any from any of your
14 colleagues, Mr. Kirby?

15 BY MR. KIRBY:

16 Q I just want to be sure I understood the
17 description of what was given just a minute ago.
18 During these negotiations with the companies that you
19 were in litigation with, were there meetings at which
20 you discussed both solving the interactivity issue and
21 the terms of the statutory license?

22 A I don't know.

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1 Q The other question is you referred to DMA.
2 DMA does not represent broadcasters, does it?

3 A No.

4 Q That's all I have.

5 CHAIRMAN VAN LOON: No further questions
6 for this witness?

7 ARBITRATOR VON KANN: I'd like to get a
8 little more clarification about the market place that
9 we're dealing with and you've indicated a moment ago
10 that in your view it is really dominated by three
11 large players, AOL, Viacom and Yahoo.

12 THE WITNESS: Yes.

13 ARBITRATOR VON KANN: And I'd like to
14 understand that a little bit better. Does AOL, let's
15 just start with AOL, alphabetically. Does AOL own a
16 number of different companies that are webcast
17 streamers or does it itself do a big chunk of that
18 which remains?

19 THE WITNESS: When you log on to the AOL
20 service they have essentially a page or a section
21 called AOL music and as part of AOL music they have a
22 number of different music services, many of which are

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1 done -- are marketing deals and technology deals that
2 are very cooperatively done with the record industry.
3 Thee's a section in AOL music called spinner.com which
4 is essentially their webcasting site and so you -- and
5 spinner used to be an independent company until I
6 think it's almost two years ago now when AOL paid
7 something like \$320 million to acquire spinner because
8 AOL wanted to be in the webcasting business.

9 ARBITRATOR VON KANN: Let me go at this a
10 slightly different way. Earlier today you said that
11 it's a bit of a misnomer to speak about 2200 entities
12 because probably 2000 of them are radio stations.

13 THE WITNESS: Right.

14 ARBITRATOR VON KANN: And I gather because
15 you also said a large chunk of the radio stations in
16 the United States are owned by five large entities,
17 that would apply to this group of 2,000, is that
18 right?

19 THE WITNESS: Presumably, yeah.

20 ARBITRATOR VON KANN: Who are those five
21 major, if you recall them, the five major radio
22 station conglomerates or groups or majors or whatever?

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1 I've heard reference to Bonneville, I believe is one.
2 Maybe not.

3 THE WITNESS: Mr. Kirby is probably better
4 at this than I am. I'm not sure -- it's Clear Channel
5 is the biggest. There are a couple of others in this
6 proceeding and then ABC Radio. I'm not sure of all
7 their names.

8 ARBITRATOR VON KANN: But in any event
9 there are, if I understand you, about five large
10 families or groupings of radio stations in the country
11 which probably own a big chunk of that group of 2000
12 stations?

13 THE WITNESS: Yes, five or six.

14 ARBITRATOR VON KANN: Five or six.

15 THE WITNESS: Yes.

16 ARBITRATOR VON KANN: And I don't want you
17 to guess, but do you have any idea how many of that
18 approximately 2,000 radio stations are independent of
19 this big five or six?

20 THE WITNESS: I don't know. They're
21 certainly independent broadcasters. But I'm trying to
22 think who on our side would be the best -- probably

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1 Mr. Altschul next witness, would be better.

2 ARBITRATOR VON KANN: What is the term I
3 should be using for these five or six, broadcasters?

4 THE WITNESS: Broadcast groups I think is
5 what they call themselves.

6 ARBITRATOR VON KANN: Broadcast groups,
7 okay. So you think there are about five or six large
8 broadcast groups that own a large portion of the 2000
9 or so applicants who are radio stations?

10 MR. STEINTHAL: If I may, the number that
11 came up yesterday and it's in their papers as well, I
12 think it's 1557 of the applicants on this side are
13 radio stations as opposed to 2000.

14 MR. SCHECHTER: Some of this information,
15 incidentally, is in an exhibit that's already in the
16 case. It's RIAA Exhibit 126. I didn't want to
17 interrupt, but I felt that --

18 ARBITRATOR VON KANN: I may go back and
19 look at that.

20 CHAIRMAN VAN LOON: 126, if I recall, then
21 goes on in many pages to list them all.
22 Alphabetically.

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1 MR. SCHECHTER: And in fact, you would
2 fairly quickly, I'm not going to testify, but if you
3 look at the exhibit, you'll fairly quickly see who the
4 big ones are because they go for pages.

5 ARBITRATOR VON KANN: Okay, let's leave
6 those 1500 or so alone for a while and deal with other
7 700-odd which are not, I guess, broadcasters. They're
8 internet streamers, I guess, webcasters.

9 Are you saying that a significant chunk of
10 that group of 700 or so entities are affiliated in
11 some way either with AOL or Viacom or Yahoo?

12 THE WITNESS: No.

13 ARBITRATOR VON KANN: No?

14 THE WITNESS: No.

15 ARBITRATOR VON KANN: Are you saying
16 they're independent, but rather small players?

17 THE WITNESS: Yes. Probably 15 or 16 or
18 them are affiliated with Viacom. But Yahoo wouldn't
19 be in that list because Yahoo has a --

20 ARBITRATOR VON KANN: Do you want to hand
21 me that exhibit for one second?

22 MR. SCHECHTER: I apologize. I thought

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1 about doing it on Redirect and just decided not to do
2 it. I obviously made a mistake.

3 (Pause.)

4 THE WITNESS: This first page makes the
5 point I was going to make which is that there are over
6 500 companies that filed with the Copyright Office
7 their notice to seek the compulsory license that are
8 not in the business, like -- I don't know, like us,
9 Army Times Magazine for some reason filed, but they're
10 not in the business. Television broadcasters filed,
11 so this chart, I think, narrows the page more
12 accurately.

13 ARBITRATOR VON KANN: In essence, I think
14 I'm trying to understand a little bit more what might
15 be called the concept of market power from the other
16 side of the table.

17 THE WITNESS: Right.

18 ARBITRATOR VON KANN: And I'm trying to
19 get a little sense of the concentrations that exist.

20 THE WITNESS: Right.

21 ARBITRATOR VON KANN: What I think I'm
22 hearing from you is that in this group of 1557 AM or

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1 FM broadcast sites a big chunk of those, you think are
2 controlled by these 5 to 6 broadcast groups?

3 THE WITNESS: Yes.

4 ARBITRATOR VON KANN: With respect to the
5 other applicants, 549 of them are not at the moment
6 operational?

7 THE WITNESS: Right.

8 ARBITRATOR VON KANN: That leaves 187.

9 THE WITNESS: Right, so why are there only
10 three out of 187.

11 ARBITRATOR VON KANN: Let me pursue it
12 this way, I think what you're saying is that of that
13 187 by far the biggest are AOL, Yahoo and Viacom, in
14 terms of traffic, in terms of revenue, I guess in
15 terms of their own resources, but that still leaves
16 184 other independent entities, perhaps small, perhaps
17 not having many listeners or not much revenue, but
18 they aren't directly controlled by or owned by AOL,
19 Viacom or Yahoo. So you'd have to make deals if you
20 wanted to with those entities or they'd have to come
21 in here and get the license if they wanted to
22 participate.

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1 THE WITNESS: Right, and what I was
2 inarticulately saying was that in essence the 25 deals
3 are more appropriately matched against that 180 as
4 opposed to the 2000 who rejected the deal. I think
5 that and of those 25 we can probably talk to another
6 25 or so, but that there is not this sort of massive
7 group of people that rejected the deal and only a
8 minuscule percentage of the market place that accepted
9 a deal that probably everyone can agree that the small
10 players balance out and that the big players dominate.

11 ARBITRATOR VON KANN: Let me just probe
12 this a little bit further. You -- I'm sure are more
13 familiar than I with the resources and the business
14 operations of AOL, Viacom and Yahoo. I certainly know
15 something about them, but from my own edification and
16 understanding, let's take somebody like AOL. It's in
17 this business, but it's in lots of other businesses as
18 well, correct?

19 THE WITNESS: Yes.

20 ARBITRATOR VON KANN: In a very thumbnail
21 way, do you have a sense of what part of AOL's overall
22 business operations or revenues this webcasting

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1 occupies? Is this on their radar screen is this a
2 blip of 2 percent of their business? Is this becoming
3 50 percent of their business? Have you got any idea
4 how important webcasting, how webcasting fits into
5 AOL's overall business operations?

6 MR. STEINTHAL: I am not sure that this
7 witness has any foundation to answer that. Obviously,
8 you'll hear from the spinner people who are on our
9 witness list.

10 ARBITRATOR VON KANN: I don't want you to
11 guess, but you've also tried to initiate some
12 discussions with both of those entities and I suppose
13 you did some homework and you have some information,
14 so I'm not trying -- don't go beyond the scope of what
15 you know, but I'm just trying to get a rough sense of
16 how big a facet these three major players, this new
17 nascent is?

18 THE WITNESS: And I wouldn't presume to
19 speak for AOL, I assure you. AOL will be here and you
20 can ask them.

21 ARBITRATOR VON KANN: Sometimes it's good
22 to ask both sides.

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1 THE WITNESS: My perception is and my
2 experience in talking to them is over the last several
3 weeks there have been several announcements out of AOL
4 about the increasing importance of AOL music to the
5 overall goals of the company and I know that they made
6 a \$320 million investment in spinner.com and when I
7 compare the fees we're seeking for the artists and
8 record companies that actually produce that music
9 compared to what they paid to be in the business, it
10 pales in comparison. So that's sort of, I think, the
11 first perspective. But obviously, it is a broad-based
12 company that has multiple strategies to attract people
13 to their service.

14 ARBITRATOR VON KANN: Viacom is in many
15 different businesses. Again, do you have any sense of
16 where this fits in in terms of importance in their
17 overall business operations?

18 THE WITNESS: And again, I think MTV
19 Interactive is going to be a witness, so likewise I
20 wouldn't presume to speak for them. But Viacom is a
21 -- music television is the essence of MTV. They have
22 consistently made drawing people to their site.

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1 They're in very active partnership with record
2 companies on many things. Many of our member
3 companies have individual license arrangements with
4 MTV and MTVI, but again, they wanted to be in the
5 webcasting business and they paid \$45 million to get
6 into the business by buying a company called Sonic Net
7 and another company called Imagine Radio, I think is
8 the name of it. So I can't make the judgment for
9 them, but these companies are making significant
10 investments to be in this business so that's why we
11 come to the conclusion that actually paying for the
12 supplies that drive business have some value.

13 ARBITRATOR VON KANN: Finally, Yahoo does
14 many things including, I think, a substantial internet
15 service provider in a lot of ways.

16 THE WITNESS: Yes.

17 ARBITRATOR VON KANN: Do you have any
18 sense of what their investment or what portion of
19 their overall operations this webcasting occupies?

20 MR. STEINTHAL: Again, I hate to lodge an
21 objection to the Panel's question, but in particular
22 where we don't even control the ability to bring a

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1 witness in from Yahoo, I question the -- I have to
2 press a foundation objection.

3 The other ones, we'll bring in witnesses,
4 they're on the list, but I don't know whether this
5 witness is qualified to answer that question with any
6 kind of --

7 ARBITRATOR VON KANN: Do you expect to
8 present in your rebuttal case evidence about Yahoo and
9 its involvement in the webcasting business?

10 MR. STEINTHAL: I sure hope so. But as
11 you can imagine, it wasn't until yesterday that the
12 secrecy veil was lifted and we don't control them in
13 any event. I hope that they will testify. I hope
14 they will bring to you the circumstances surrounding
15 the Yahoo deal that I think would be quite informative.
16 But this being the kind of proceeding that it is, we
17 don't have the power to compel them to come here.

18 MR. SCHECHTER: Nor do we.

19 ARBITRATOR VON KANN: And you don't think
20 any of the witnesses you've listed in your direct case
21 would be able to speak to this?

22 MR. STEINTHAL: They will definitely not

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1 be able to speak to it.

2 ARBITRATOR VON KANN: This being this
3 Yahoo stake in the webcasting business.

4 MR. STEINTHAL: There may be people with
5 knowledge of the industry more generally and there are
6 experts in the case that can speak to industry data
7 about that.

8 THE WITNESS: I can speak about publicly
9 available information.

10 ARBITRATOR VON KANN: I think with the
11 understanding that we'll stick for the moment to the
12 public record, let's just get a general sense of what
13 you understand about Yahoo's investment or stake in
14 the webcasting business.

15 THE WITNESS: Well, I can tell you that my
16 conversations with Yahoo began quickly after they
17 invested \$3 billion to buy a company called
18 Broadcast.com which were broadcast retransmitters and
19 they have deals with several hundred radio stations to
20 retransmit their signal on the internet. So Yahoo's
21 stake was quite big, their investment quite large and
22 their intentions quite public.

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1 ARBITRATOR VON KANN: And I think,
2 frankly, I think that fact is in the record from some
3 other witness, I don't remember who, but I remember
4 the discussion about purchasing Broadcast.com. I
5 don't have the purchase price.

6 That would suggest that their stake is
7 dramatically larger than either of the other two that
8 you mentioned.

9 THE WITNESS: Yes, although you have to
10 actually balance that against the issue at the time
11 which was that broadcasters claimed they weren't even
12 covered. We thought retransmitters were a clearer
13 case and that they would be covered, but then the
14 issue of whether they were subject to the 150 mile
15 exemption came up.

16 ARBITRATOR VON KANN: Was the fact that
17 you did indeed, you were able to reach the agreement
18 apparently with Yahoo, did you say let's pick the
19 largest one and Yahoo is the largest one far and away
20 so let's start with them? Or did it happen to be they
21 were the one most ready to sit down and talk? Is it
22 a coincidence that the deal you struck is at least by

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1 your figures with a company who has invested a great
2 deal more than anybody else in getting into this
3 business?

4 THE WITNESS: I think they were the lower
5 hanging fruit for two reasons. They were not members
6 of DMA and therefore we're not constantly being told
7 that it was against their interests to have a
8 negotiated rate to go to a CARP. And because we were
9 prepared to work with them on the broadcast issue.

10 ARBITRATOR VON KANN: Okay, that's all I
11 have.

12 MR. STEINTHAL: Can I ask a couple
13 questions raised by your questioning, Your Honor?

14 ARBITRATOR GULIN: Excuse me --

15 MR. SCHECHTER: I don't really have any.

16 RECROSS EXAMINATION

17 BY MR. STEINTHAL:

18 Q Ms. Rosen, you were referring to the 549
19 sites not webcasting as opposed to the 187 that are,
20 without going back to the chart, you're familiar, are
21 you not, that several of your licenses are with
22 companies that are not streaming?

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1 A Yes.

2 Q And that have not ever streamed?

3 A Yes.

4 Q Now you talked about MTV and AOL. Let me
5 ask you this question, have you come to know that they
6 have a rather long-term view of the webcasting
7 business in terms of the way they see it and where
8 they'd like to see it go?

9 A Both of those companies are very closely
10 aligned in many ways with the music business and I
11 have very good friends in the top management of both
12 of those companies. I'm not disparaging their motives
13 at all in not having settled an agreement. I just
14 call the facts as I see it.

15 Q I understand it.

16 A I assume that they have their reasons for
17 not having negotiated a deal.

18 Q But don't you know, in fact, that they
19 have said to you that they view this issue in the long
20 term, not in the short term, therefore they want to
21 make sure that the rate that gets set is a fair rate
22 for the long term?

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1 A I believe that they have their own
2 legitimate reasons for not having a negotiated
3 settlement, but I don't recall anybody specifically
4 saying that I have a short term deal and they had a
5 long term deal.

6 Q I have no further questions. I'll yield
7 to Tom.

8 BY MR. KIRBY:

9 Q I have just a couple questions. Ms.
10 Rosen, my recollection of your earlier testimony about
11 AOL was that your ultimate deal with them arose out of
12 your discussion with I think it was AOL's President,
13 is that right, about -- Yahoo, excuse me, Yahoo. Your
14 deal with Yahoo, pardon me, with Yahoo's President
15 about a number of issues, is that right?

16 A I think his title is Chief Yahoo.

17 Q But there was a discussion with the Chief
18 Yahoo about a number of issues and that led to the
19 deal that you ultimately entered. Was that your
20 previous testimony?

21 A Yes.

22 MR. SCHECHTER: Can I interject? This is

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1 not -- this seems to me to be beyond the scope of what
2 Judge Von Kann was asking about.

3 MR. KIRBY: She just went through the
4 Yahoo deal and the AOL deal and all that stuff.

5 MR. SCHECHTER: I think that what she said
6 was they contacted her right after they bought
7 Broadcast.com. The opportunity to have questioned her
8 on the specifics of those conversations would have
9 been in conjunction with either the original cross
10 examination that Mr. Steinthal did or the other cross
11 examinations that were done. I think that we are
12 sitting here at 5:15 going back over new ground,
13 ground that should have been covered before and was
14 not provoked by Judge Von Kann's questions. It's late
15 in the day to start back over things.

16 ARBITRATOR VON KANN: A little hard to
17 know without hearing the question that follows whether
18 it was provoked by me or not.

19 MR. KIRBY: I believe the answer to the
20 question was yes, wasn't it, my last question?

21 THE WITNESS: Yes.

22 MR. KIRBY: I had no follow-up question as

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1 far as that one was going.

2 (Laughter.)

3 MR. SCHECHTER: I apologize.

4 BY MR. KIRBY:

5 Q Now my only other question was I want to
6 make sure that I understood the marketplace as you
7 described it to Judge Von Kann and as you see the
8 market there are three big webcasters, is that right?

9 A Yes.

10 Q And you have a deal with one?

11 A Yes.

12 Q And you look at -- then you look at the
13 radio stations. There are five big groups of radio
14 stations, right?

15 A That's my guesstimate, that they are
16 somewhere around five or six.

17 Q And you have got a deal with none of them?

18 A Right.

19 Q And then there's a group, a substantially
20 larger group of smaller groups and you got -- radio
21 stations and you got deals with none of those. Is
22 that right?

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1 A Other than the several hundred radio
2 stations paying to Broadcast.com.

3 Q But that's a webcaster really, right? You
4 don't have a deal with any broadcaster whether it's
5 big chain, medium chain or small chain?

6 A That was established yesterday.

7 Q So basically you have one big deal and
8 then you've got a bunch of little bitty deals, is that
9 fair?

10 A Medium to small.

11 Q Medium to small deals, and of those a fair
12 number of those were sort of gleam in the eye deals
13 that still aren't webcasting, isn't that true?

14 A I don't know how you define a fair number,
15 but a few.

16 Q And another chunk are those that tried
17 that didn't get anywhere and they're dead, is that
18 right?

19 A The deals are dead you mean?

20 Q Right.

21 A Who knows, they could call us tomorrow.

22 Q But when all is said and done, given your

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1 view of the market, what you really have is Yahoo and
2 chump change, isn't that it?

3 A I don't think it's very nice to call a
4 company chump change, so I wouldn't say that.

5 Q You wouldn't say it that way, but the idea
6 is right?

7 A I think that what we have it
8 representative more of the webcast community than of
9 the broadcaster community where there's large players
10 and small players and not of the broadcasters side of
11 that. If that's your point, I agree with that.

12 Q That's all I've got.

13 ARBITRATOR VON KANN: As Daniel Webster
14 said, it's a small college, sir, but there are those
15 who love it.

16 (Laughter.)

17 CHAIRMAN VAN LOON: Any more Redirect?

18 MR. SCHECHTER: No sir.

19 CHAIRMAN VAN LOON: Any more questions of
20 other Panelists for this witness?

21 Thank you so much, Ms. Rosen for being
22 with us.

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1 (The witness was excused.)

2 CHAIRMAN VAN LOON: I believe a motion was
3 in order. We were checking during the break. We do
4 not believe that Exhibit 4 was ever moved.

5 MR. STEINTHAL: I'm sorry if I didn't move
6 it. I shall move it. As soon as I remember what it
7 is --

8 ARBITRATOR VON KANN: The interview with
9 Silicon Valley or something?

10 MR. SCHECHTER: We have no objection.

11 CHAIRMAN VAN LOON: Exhibit 4 is moved and
12 approved and is also part of the record.

13 (The document, having been
14 marked previously for
15 identification as Exhibit SX-4
16 was received in evidence.)

17 MR. SCHECHTER: And I presume that since
18 no objection has been stated to any of the Hillary
19 Rosen exhibits that all of those are deemed to be
20 admitted?

21 MR. STEINTHAL: Can you remind me just
22 what they are?

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1 ARBITRATOR GULIN: You're speaking of the
2 direct exhibits?

3 CHAIRMAN VAN LOON: They're in evidence
4 unless there's a motion to strike. That's taken care
5 of.

6 MR. SCHECHTER: Thank you.

7 CHAIRMAN VAN LOON: We would next like to
8 hear from Mr. Garrett with regard to the NPR
9 discussions.

10 Thank you for your efforts to moving
11 closer to the mike. We all have an interest in having
12 a complete and full record of this proceeding and
13 everything that can be done to assist the reporter by
14 helping with these mikes, some of which are delicate
15 and some of which are taped in place and others of
16 which are not would be greatly appreciated all the way
17 around. Thank you.

18 MR. GARRETT: Mr. Chairman, I think under
19 the terms of the protective order as currently drafted
20 that Ms. Leary would not be able to participate in any
21 of the closed sessions. Likewise, under the terms of
22 the agreement that we had entered into before with her

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1 to try to resolve this issue she also would not be
2 allowed to participate in any of the closed sessions.

3 I understand the Panel sense is that you
4 would like her to be able to participate in the closed
5 sessions and along those lines what we are prepared to
6 do and what I believe is acceptable to Ms. Leary is to
7 waive the terms of the protective order so that she
8 can participate in the closed sessions and also
9 receive restricted materials on the following
10 conditions.

11 One is that it's clear that this applies,
12 this waiver applies only to Ms. Leary and not to any
13 other employee of NPR. Second, that it be made clear
14 that we are willing to waive in these limited
15 circumstances because she is the sole trial counsel
16 for NPR and third that this waiver would not in any
17 way be used against us to allow other employees of
18 other parties in this proceeding to have access to
19 restricted materials or to participate in closed
20 sessions in a manner that would be inconsistent with
21 the existing protective order.

22 MS. LEARY: That's acceptable to me.

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1 MR. JACOBY: The services stipulate those
2 conditions as well.

3 CHAIRMAN VAN LOON: Excellent. We thank
4 you both for working to find a resolution that enables
5 us to go forward. Thank you.

6 I understand that you have a procedural
7 issue which may be short.

8 MR. JACOBY: Yes, the procedural issue as
9 follows, actually discussions have begun -- is an
10 issue that actually began in the prehearing phase, but
11 we realize has to carry over to CARP itself.

12 As background here I guess it begins with
13 the RIAA made a motion with respect to the prior CARP
14 under 114, a decision in that case. The only decision
15 that you have in the record is, the public version and
16 there was a motion made by the RIAA to have the
17 unredacted version be made part of the record in this
18 case.

19 MR. GARRETT: One clarification. We
20 submitted both the public and the redacted version of
21 that CARP Panel Report and we put that in the record.
22 There was a special ruling in the CARP proceeding that

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1 allowed us to submit to the next CARP both the
2 redacted and unredacted versions and pursuant to that
3 order which we cited when we filed our direct case we
4 have included in the documents filed here both the
5 redacted and unredacted versions.

6 What we did is we were not able under the
7 prior order to serve copies of the unredacted report
8 of any of the other counsel, so we filed a motion with
9 the Copyright Office asking for permission to serve
10 that unredacted -- I'm sorry, the redacted version,
11 restricted version on all counsel. That motion
12 remains pending. They still have not granted it. We
13 took it up with the Copyright Office a couple of days
14 ago and said they had not ruled on it, they wanted to
15 hear back from the other parties involved in that case
16 as to whether or not there was any objection. They
17 encouraged us to contact them and we had, in fact,
18 been contacting them throughout this period to try to
19 get them to agree to allow us to serve it on everyone
20 else.

21 Those parties, one of them is a party in
22 this proceeding, DMX. The other two are Music Choice

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1 and they withdrew from this proceeding. And the third
2 was Muzak. So we still have not gotten any kind of
3 clearance of the other parties of that case to
4 actually serve this redacted version or unredacted
5 restrictive version on all the other parties.

6 ARBITRATOR VON KANN: When did you file
7 your motion about this matter?

8 MR. GARRETT: At the very time we
9 submitted our direct case, Your Honor.

10 ARBITRATOR VON KANN: In April?

11 MR. GARRETT: Yes, Your Honor.

12 ARBITRATOR VON KANN: April 11, I think,
13 was the date for the direct case. And that was served
14 on Music Choice and Muzak as well?

15 MR. GARRETT: Yes, Your Honor.

16 ARBITRATOR VON KANN: But they haven't
17 responded?

18 MR. GARRETT: That's correct, Your Honor.

19 ARBITRATOR VON KANN: They may have missed
20 the boat. We've got 179 days. We're sailing.

21 (Laughter.)

22 MR. JACOBY: And the wonderful way in

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1 which the proceedings go, you have a document in the
2 files here as part of the record ostensibly which we
3 have yet to see which can't possibly continue to be
4 the case one way or the other. We need to resolve it,
5 presumably by an order, whether it's by the Copyright
6 Office or by this Panel making those documents
7 available to us.

8 The second facet of it, let me just put
9 that on the table, is that there are two expert
10 witnesses who gave testimony in that CARP decision who
11 are named witnesses in this case. One is Wildman and
12 he's an RIAA witness and Mr. Woodbury who has been
13 offered by NPR. Testimony given by those two
14 witnesses is totally blocked under the protective
15 order that was evident in that case, whether it was
16 proper or not, so we have not even a public version,
17 let alone an unredacted version of that, those
18 particular documents. Of course, Mr. Garrett has
19 access to both of those documents because he was
20 involved in that proceeding. We have no access and
21 certainly we think it would be fair to the parties in
22 this proceeding on both sides that as a matter of not

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1 only access, but potential use on cross examination
2 was appropriate that we have Mr. Wildman's testimony
3 and Mr. Woodbury's testimony from that CARP
4 proceeding, both the actual testimony and then written
5 testimony and all testimony be available to us.

6 Under the protective order applicable here
7 --

8 CHAIRMAN VAN LOON: Mr. Jacoby, is there
9 any pending motion asking the Copyright Office for
10 permission of that parallel to the one --

11 MR. JACOBY: I'm sorry, we raised that in
12 conversation with Mr. Roberts that occurred a few days
13 ago, the question was raised what's happened to this
14 motion itself and I guess it was suggested it's not
15 technically a discovery matter so it's really not
16 necessarily a motion for the Copyright Office, and we
17 see it really as -- I think Mr. Roberts gave it to the
18 Panel and as a matter of fairness in having that
19 testimony available for both sides.

20 CHAIRMAN VAN LOON: I gather that the
21 prior one, Mr. Garrett, you have a pending motion, was
22 that discussed with Mr. Roberts at the time?

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1 MR. GARRETT: Yes.

2 MR. JACOBY: Both of those were discussed.
3 Mr. Roberts, as Mr. Garrett indicated, Mr. Roberts
4 said well, we haven't gotten clearance from the
5 parties in the prior proceeding and encouraged Mr.
6 Garrett to talk to those people. We were not parties
7 to that proceeding. And we mentioned the situation
8 with the testimony and the gist of it was, I guess --

9 ARBITRATOR VON KANN: Why, Mr. Garrett,
10 would these kinds of materials be any different than
11 for example the 26 agreements or lots of other stuff
12 that was produced in this record subject to a
13 protective order and restriction? Why would this --
14 I'm sure there was some trade information, proprietary
15 and financial information here, but so was there in
16 lots of other stuff. Why would it be any different?

17 MR. GARRETT: Only, Your Honor, because
18 they are subject to a different protective order which
19 I am bound by and that protective order would require
20 the other parties whose interests are affected here to
21 either give their consent or to have -- that raises an
22 interesting issue as to whether a subsequent CARP has

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1 the ability to sort of unseal the restricted documents
2 from a prior CARP.

3 I fully agree with Mr. Jacoby. I have no
4 problem in ensuring that both the Wildman testimony is
5 available to him and of course, I would like to be
6 able to use the Woodbury testimony as well. But the
7 terms of the protective order in that proceeding would
8 prohibit that specific use absent the consent of the
9 parties or as I say either a ruling from -- I don't
10 know whether it's this CARP or whether it's a ruling
11 from the Copyright Office.

12 MR. JACOBY: Perhaps we can suggest that
13 and agree with Mr. Garrett that the Panel consult with
14 the General Counsel's Office here and decide who it is
15 has the power to do something about this and
16 presumably since the parties here agree and I'm sure
17 the Panel agrees with the appropriate way to treat it,
18 that we get it done and get it done promptly because
19 we've got Mr. Wildman coming up shortly.

20 CHAIRMAN VAN LOON: That was my thought.

21 MR. JACOBY: Within two weeks. So this
22 takes, any time you need to do this, it's got to be

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1 done promptly at the start of this proceeding.

2 CHAIRMAN VAN LOON: That was my thought
3 exactly and we should consult immediately with the
4 staff as quickly as we can of the General Counsel of
5 the Librarian for the Copyright Office and let us do
6 everything we can to clear this up as quickly as we
7 can.

8 MR. JACOBY: Thank you very much.

9 MR. GARRETT: Let me just add, Your Honor,
10 that we have been making efforts here to get that
11 consent, at least for our original motion here and as
12 I say one of the people who we have been trying to get
13 consent from is, in fact, a party in this proceeding
14 here. And I don't know --

15 ARBITRATOR VON KANN: DMX hasn't responded
16 to this motion?

17 MS. AISTARS: Yes, Your Honor. I'm Sandra
18 Aistars. I represent DMX at AEI. And just for the
19 record, DMX is a party in this proceeding and I don't
20 know whether there is an objection with regards to the
21 previous proceeding, but they were represented by
22 different counsel in the previous proceeding and I

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1 understand that Mr. Garrett has communicated with the
2 previous counsel and not with us.

3 MR. GARRETT: That's right.

4 MS. AISTARS: To obtain the release.

5 CHAIRMAN VAN LOON: And are they simply
6 not replying to your communications or they're saying
7 maybe or they're saying we'll get back to you in a
8 week or what -- the check is in the mail?

9 MR. RICH: Let me short circuit this.
10 Upon your agreeing, I will personally call the right
11 folks within DMX and certify the question. I'm
12 confident they'll say fine. We also have a
13 relationship although not in this manner with Muzak
14 and I'm prepared to do the same thing with the General
15 Counsel at Muzak and with respect to Music Choice,
16 somebody will have to -- I could volunteer, I suppose,
17 communicate with their counsel as well, whom I know
18 and I don't know the outcome of all of that. I'd be
19 reasonably confident that the DMX won't have a
20 problem. I would be hopeful that Muzak wouldn't have
21 a problem.

22 CHAIRMAN VAN LOON: Well, let us then go

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1 forward as quickly as we can to clarify with the
2 Library staff, General Counsel and unless there's some
3 unanticipated problem, we want to avail ourselves of
4 your good offices.

5 ARBITRATOR VON KANN: Can I just to get
6 the ground, the lay of the land here. With respect to
7 the 25 or now 26 agreements, did you obtain in each
8 case the consent of the licensees to produce those
9 agreements in this proceeding? Does that have to be
10 done?

11 MR. GARRETT: In the case of those 25 or
12 26 agreements, I believe that there was a provision in
13 the agreement that would permit us to make them
14 available to the CARP and I think we operated pursuant
15 to that provision.

16 We also submitted a number of other
17 agreements that were agreements from individual record
18 labels. Many of those cases, there was consent that
19 needed to be obtained and we did obtain that consent
20 in several cases. In other cases, where we couldn't
21 obtain the consent, we didn't make that document
22 available as part of our direct case. Subsequently,

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1 we were asked for those agreements in discovery and
2 replied that we could make them available unless
3 ordered to do so. We were ordered to do so and then
4 made virtually all of them available with the
5 exception, I believe, of two or three agreements where
6 the party objecting happen to be one of the webcasters
7 on the other side who we have a deal with.

8 In those cases, this was the subject of a
9 Copyright Office order, in those cases, the Copyright
10 Office directed that both parties make requests of
11 those webcasters to release the confidentiality so we
12 could make those agreements available in discovery.
13 And to the best of my knowledge, those webcasters have
14 not agreed to produce the agreements.

15 ARBITRATOR VON KANN: And therefore, it's
16 your understanding, your view that they can't be
17 produced in this proceeding?

18 MR. GARRETT: Yes, the question was
19 whether -- that is correct, Your Honor. The Copyright
20 Office ruled. They said if we did not -- if the
21 webcasters on the other side have refused to produce
22 those agreements, then the particular motion that the

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1 webcasters had filed to compel our production of those
2 agreements would be deemed moot.

3 CHAIRMAN VAN LOON: Were there any other
4 procedural or administrative matters?

5 MR. SIGALL: I just had one minor matter.
6 I'm Joel Sigall from Arnold Porter. I just want to
7 make a point. We've arrayed our materials here on the
8 side and that by doing so we're still operating under
9 the protective order and they're secure in putting
10 restrictive materials up there we haven't waived
11 anything in terms of restricted and it will be the
12 same for the other side, just to make clear that this
13 is a secured room and we don't have to lug these back
14 and forth or secure them in any way.

15 MR. STEINTHAL: That's fine.

16 CHAIRMAN VAN LOON: And only for your
17 information, I do know that one reporter who was
18 present walked over and put briefly a tape recorder on
19 the top of your volume, so you may want to just --

20 MR. STEINTHAL: Hopefully, they don't
21 speak for themselves.

22 (Laughter.)

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1 ARBITRATOR VON KANN: Actually, it was a
2 small x-ray machine.

3 (Laughter.)

4 CHAIRMAN VAN LOON: Is Ms. McLaughlin here
5 with us? Yes. Welcome.

6 How long do you anticipate for Direct?

7 MR. WINTERS: Fifteen to 20 minutes.

8 CHAIRMAN VAN LOON: Wonderful. Welcome
9 you to the proceeding.

10 (Off the record.)

11 WHEREUPON,

12 LINDA McLAUGHLIN

13 WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE
14 RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. AND,
15 HAVING FIRST BEEN DULY SWORN, WAS EXAMINED AND
16 TESTIFIED AS FOLLOWS:

17 DIRECT EXAMINATION

18 BY MR. WINTERS:

19 Q Good afternoon, Ms. McLaughlin. For the
20 record, could you just state your name?

21 A I'm Linda McLaughlin.

22 Q Ms. McLaughlin, what do you do for a

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1 living?

2 A I am a consulting economist with National
3 Economic Research Associates.

4 Q How long have you been with National
5 Economic Research Association?

6 A Since 1974.

7 Q And what do you do as a consulting
8 economist?

9 A I do work on competition issues and
10 regulatory issues, particularly in the entertainment
11 industry, but also in a variety of other industries
12 including insurance and telecommunications.

13 Q Have you had any involvement with the
14 recording industry?

15 A Yes.

16 Q What has been your involvement with the
17 recording industry?

18 A The earliest involvement I had was in the
19 establishment of a mechanical rate for songs used on
20 recordings and that was in the 1980s. The proceeding
21 didn't go forward. There was a negotiated rate after
22 I did some work and I worked a little bit on the

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1 negotiations for that.

2 Then I worked for individual record
3 companies as part of other litigation in the late
4 1990s and still today and as a part of that proceeding
5 I looked at, had to examine the financial records and
6 other data for those record companies and that's
7 really how I got involved in this proceeding because
8 I already had some familiarity with the financial data
9 of the record companies.

10 Q How many years of financial data did you
11 have familiarity with?

12 A Basically from 1988 through 1997. I've
13 seen very little information beyond 1997.

14 Q And what would you consider your
15 profession to be?

16 A I'm an economist.

17 Q And what is your educational background?

18 A I have a Bachelor of Science degree in
19 Math from Marquette University. And then I was in a
20 Ph.D. program at University of Pennsylvania where I
21 completed my Master's degree and the course
22 requirements for a doctorate, but I didn't get my

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1 thesis, didn't write my thesis.

2 MR. WINTERS: At this point I would offer
3 Ms. McLaughlin as an expert in the field of financial
4 data of the recording industry and offer her for voir
5 dire.

6 MR. JACOBY: I don't accept that proffer
7 as an expert in financial data in the recording
8 industry.

9 That's a strange proffer based on that statement.
10 She's had some familiarity with financial data that
11 makes her an expert at financial data? She may be a
12 highly esteemed economist.

13 ARBITRATOR VON KANN: You know the
14 conclusions that they hope to elicit from her.

15 MR. JACOBY: Yes.

16 ARBITRATOR VON KANN: So the question is
17 whether the foundation either here or in the written
18 is sufficient for her to give those opinions. If you
19 think it's not, we should probably deal with that.

20 MR. JACOBY: I think for starters, I don't
21 believe there are any opinions in her testimony.

22 ARBITRATOR VON KANN: Or facts that are

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1 within her knowledge or within her expert ability to
2 gather.

3 MR. JACOBY: I think the testimony is the
4 testimony based on the information that she gathered,
5 whether that -- whether she's an expert in financial
6 data, I wouldn't know.

7 The fact that she has previously consulted
8 with some record companies doesn't qualify her as a
9 "expert in financial data and record companies."
10 Surely that proffer is inadequate.

11 MR. WINTERS: Your Honors, she has
12 testified that she has dealt with the financial data
13 of the recording industry over a 10-year period. She
14 dealt with them in an extended period of time. I
15 think that at least qualifies her as an expert to talk
16 about the data she's going to be discussing as she
17 described it in her direct testimony.

18 And certainly if she would be accepted as
19 a fact witness to talk about the data that she talks
20 about would be acceptable for the recording industry.

21 MR. JACOBY: At this point there's not a
22 foundation laid to make her an expert in financial

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1 data in the record industry. We can look at her
2 testimony or hear her testimony that will be
3 elucidated today, but as I review her testimony, I
4 don't see any expert economist activity involved here.

5 CHAIRMAN VAN LOON: I just understood Mr.
6 Winters to say that he'd also be happy to present her
7 as a straight fact witness presenting the underlying
8 summaries of financial data which is here in the
9 direct which I guess everyone has had for a number of
10 months.

11 MR. WINTERS: And certainly we offer her
12 for voir dire in that regard as well if she's
13 qualified as a witness at all.

14 ARBITRATOR GULIN: If you are offering her
15 as a fact witness, then she doesn't have to be voir
16 dired over anything. Are you offering her at a
17 minimum as an economist, as an expert economist? I
18 don't think there's any objection to that, is there

19 MR. JACOBY: No.

20 ARBITRATOR VON KANN: In essence, this is
21 an economist who gathered certain data relating to the
22 recording industry and is here presenting it. I

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1 quickly skimmed back through. I don't believe there
2 are any opinions being offered here. So it would
3 appear that she has the requisite qualifications to
4 gather data and present it about the recording
5 industry and she's not being called upon to venture
6 expert opinions.

7 So perhaps we don't get to that issue.

8 CHAIRMAN VAN LOON: And on a number of her
9 points, the key data seems to be a division of a total
10 number by 11 years to get the --

11 ARBITRATOR GULIN: Ms. Wood, do you want
12 to be heard?

13 MR. WINTERS: She just handed me the
14 relevant regulation. It's 351.47(c).

15 ARBITRATOR GULIN: Hold on a second,
16 please.

17 MR. WINTERS: I'm sorry, (d). It says
18 "witnesses shall first be examined by their attorney
19 and by opposing attorneys for their competency to
20 support their written testimony and exhibits, voir
21 dire." We offer all of our witnesses for voir dire
22 under this section.

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1 MS. WOODS: And if I might, that's why we
2 have not tended in the past in this proceedings to
3 make a tremendous amount of distinction between a fact
4 witness and an expert witness. We have always offered
5 all of our witnesses for voir dire because of the
6 existence of this regulation in the Copyright Office
7 regulations.

8 ARBITRATOR GULIN: There is really no
9 issue here that Ms. McLaughlin is going to be able to
10 testify. It's really not a question. For one thing,
11 if there was any objection it would have had to have
12 been put forward much earlier than this. All we're
13 discussing right now is if you want to label her as an
14 expert in a particular area, which I don't know is
15 necessary to do and it seems to be the point of
16 contention here.

17 ARBITRATOR VON KANN: I guess the critical
18 question I think for Mr. Jacoby is is there a
19 challenge to her competency to support that written
20 testimony which she has offered.

21 MR. JACOBY: And there will be questions
22 that I will raise in my examination at the appropriate

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1 time concerning whether or not the documents that have
2 since been produced in discovery support the
3 testimony, the numbers that are in the testimony, but
4 that's an issue that --

5 CHAIRMAN VAN LOON: But doesn't that go to
6 standard cross examination?

7 MR. JACOBY: Yes, and conceivably could
8 lead to a motion to strike depending on whatever I
9 showed, but at the time I make my examination, there
10 doesn't seem to be anything to voir dire her about
11 here because at the moment, as I understand it, again,
12 the witness is not offering any expert opinions.
13 She's offering summaries or aggregations of data as I
14 understand it. The only issue will be as to any
15 competence will be the -- whether or not those
16 summaries or aggregations are correct and the like and
17 whether or not those aggregations are appropriate, but
18 those are questions through my cross examination and
19 any motion that might flow from that.

20 ARBITRATOR VON KANN: I think what you're
21 saying is you do not object to her proceeding to give
22 that direct testimony which has been submitted on her

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1 behalf?

2 MR. JACOBY: Subject to my -- subject to
3 what I described is my right to examine her about it
4 and make a motion to strike, if that was the
5 appropriate outcome.

6 CHAIRMAN VAN LOON: Without saying that's
7 our standard operating procedure.

8 In that case, let's please proceed with
9 Ms. McLaughlin's direct testimony.

10 MR. WINTERS: Thank you, Your Honor.

11 BY MR. WINTERS:

12 Q What is the purpose of your testimony here
13 today, Ms. McLaughlin?

14 A Really just to present the aggregation of
15 individual record company data of revenue and cost
16 categories.

17 Q And how will you be able to aggregate that
18 data?

19 A I had information from the individual
20 companies and that I was able to put into these
21 categories and in some cases had to make an estimate
22 to split something out, but in general, I had numbers

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1 behind each of these categories that I then added
2 together the numbers from BMG and EMI and so forth.

3 Q What companies were you referring to?

4 A I have data for what was at the time the
5 six major record companies now five, BMG, EMI,
6 Polygram which is now part of Universal, Sony,
7 Universal and Warner.

8 MR. WINTERS: At this point, the rest of
9 Ms. McLaughlin's testimony has been labeled as
10 restricted, especially with regard to Exhibit 1 and
11 we'd ask under the court order and previous requests
12 of the RIAA that the courtroom be closed.

13 CHAIRMAN VAN LOON: Are there any persons
14 not at this hour -- I see. The external room
15 similarly is not sound secure. The sign is going up.
16 The room is secure. Please proceed.

17 BY MR. WINTERS:

18 Q If you could just turn to Exhibit 1.

19 ARBITRATOR VON KANN: If you could just
20 note for the record that unless otherwise stated all
21 of these closings are pursuant to paragraph previously
22 cited paragraph dealing with proprietary and financial

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1 trade information and that's the section we're relying
2 on for whatever we put on the record?

3 CHAIRMAN VAN LOON: I believe that's what
4 we established earlier, that that was the basis unless
5 --

6 MR. JACOBY: So stipulated unless an issue
7 arises.

8 MR. WINTERS: Thank you.

9 (Whereupon, at 5:48 p.m. the proceedings
10 went into Closed Session.)
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CERTIFICATE

This is to certify that the foregoing transcript in
the matter of: Hearing: Digital Performance Right
 in Sound Recording and Ephemeral
 Recording,
 Docket No. 2000-9 CARP DTRA 1 & 2

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: July 31, 2001

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.


